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IN THE

Supreme Court of the United States

CAYUGA COUNTY SHERIFF DAVID S. GOULD, SENECA COUNTY SHERIFF JACK S. STENBERG, CAYUGA COUNTY DISTRICT ATTORNEY JON E. BUDELMANN, and SENECA COUNTY DISTRICT ATTORNEY RICHARD E. SWINEHART,

Petitioners,

v.

CAYUGA INDIAN NATION OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the New York State Court of Appeals in its 4-3 decision in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010), properly interpreted federal law on a matter it believed the United States Supreme Court had not yet addressed in holding that two parcels of land purchased by a successor to the historic Cayuga Indian Nation in 2003 and 2005 were exempt from New York's cigarette sales and excise taxes after two hundred years of non-Indian ownership and governance.

II. Whether in that decision the New York Court of Appeals properly held both that (i) the Cayuga Indian Nation possessed a federal reservation pursuant to the 1794 Treaty of Canandaigua despite the fact that the Cayuga Indian Nation had ceded all of its land to New York State in 1789; and (ii) the United States did not subsequently disestablish any purported federal reservation.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below are Plaintiff-Respondent Cayuga Indian Nation of New York (the "Nation") and Defendants-Appellants Cayuga County Sheriff David S. Gould, Seneca County Sheriff Jack S. Stenberg, Cayuga County District Attorney Jon E. Budelmann, and Seneca County District Attorney Richard E. Swinehart (collectively, the "Counties").

Amicus curiae in the proceeding below on behalf of the Counties are the New York State Attorney General, the New York City Corporation Counsel, the New York Association of Counties, New York State Senator Jeffrey D. Klein, the District Attorneys Association of the State of New York, and the American Cancer Society. *Amicus curiae* in the proceeding below on behalf of the Nation are the Seneca Nation of Indians, the United States Department of Justice, and Day Wholesale, Inc.

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DECISIONS BELOW

The decisions below are attached in the appendix hereto. They are the May 11, 2010 Opinion of the New York State Court of Appeals (App. A); the July 10, 2009 Opinion and Order of the Supreme Court of the State of New York, Appellate Division (4th Judicial Department) (App. B); and the December 9, 2008 Decision and Order of the Supreme Court of the State of New York (Monroe County) (App. C).

BASIS FOR JURISDICTION

The New York State Court of Appeals, the state's court of last resort, issued its decision on May 11, 2010. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

APPLICABLE REGULATIONS, STATUTES, TREATIES, AND CONSTITUTIONAL PROVISIONS

Applicable regulations, statutes, treaties, and constitutional provisions at issue on this appeal and are attached in the appendix hereto. They are: New York Tax Law § 470(16) (App. D); February 25, 1789 Treaty between the Cayugas and New York State (App. E); 1794 Treaty of Canandaigua, 7 Stat. 44 (App. F); July 27, 1795 Treaty between the Cayugas and New York State (App. G); May 30, 1807 Treaty between the Cayugas and New York State (App. H); 1838 Treaty of Buffalo Creek, 7 Stat. 550 (App. I); Nonintercourse Act, 25 U.S.C. § 177 (App. J); 1793 Indian Trade and Intercourse Act (App. K); 1802 Indian Trade and Intercourse Act (App. L); and U.S. Constitution, amend. V (App. M).

STATEMENT OF THE CASE

The issue on this petition for writ of *certiorari* is whether each of the two parcels of land recently purchased by the Nation in central New York after two hundred years of non-Indian ownership qualifies under New York's Tax Law as a "reservation" on which the Nation may sell cigarettes tax free. The Court of Appeals held that the outcome depended on whether each of the parcels was considered a "reservation" under federal law.

It is respectfully submitted that the Court of Appeals erred in applying and interpreting the relevant federal law because land which long ago had been abandoned by the Cayugas is not a "reservation." Even if it were, however, federal law holds that such land does not provide to the Nation any exemptions from state and local governance.

In 1789, New York State treated with the original Cayuga tribe whereby the Cayugas ceded all of their lands to the State which then set aside a 64,015 acre state reservation in central New York for the Cayugas' use. That historic tract of land sits at the north end of Cayuga Lake and extends down the lake's eastern and western shores. In that treaty, New York State also reserved for itself the exclusive right to purchase back the land use rights it had reserved to the Cayugas. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268-269 (2d Cir. 2005) *cert. denied*, 547 U.S. 1128 (2006). Under the Treaty of Canandaigua in 1794, the United States government sought peace with the Iroquois and, as part of that commitment, recognized the existence of the

New York State reservations. The historical record is clear that at the time of New York State's treaty with them in 1789, the Cayugas resided primarily in Canada and had no interest in retaining the New York state land use rights but instead sought to sell them on several occasions. Between 1794 and 1807, after several illegal attempts to sell their land rights to private parties, the Cayugas sold to the State all of their remaining rights and abandoned the land. *See* July 27, 1795 Treaty between the Cayugas and New York State and May 30, 1807 Treaty between the Cayugas and New York State.

For the next two centuries, the land was owned and governed by non-Indians and subject to local taxation. In 2003 and 2005, however, the Nation, a group formed in the 1970s by ancestors of the relatively few Cayugas that remained in New York with the Seneca tribe, purchased two small parcels, one in Cayuga County and the other in Seneca County, and began to sell cigarettes from convenience stores located there. In the summer of 2008 the district attorneys of Seneca and Cayuga Counties had reason to believe that large quantities of unstamped, and therefore untaxed, cigarettes were routinely being sold at the Nation's two convenience stores. (*See* Cayuga County Search Warrant (R. 126); Seneca County Search Warrant (R. 128)).[1]

New York Tax Law § 1814 imposes criminal penalties for possession of untaxed cigarettes in violation of New York Tax Law § 471, which states that there is "hereby

1. Citations to the Record, or "R.", refer to the record on appeal to the New York State Court of Appeals. That record is not being submitted herewith but will be provided at the Court's request.

imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax . . . ." Indian groups have argued that the state is without power to tax cigarette sales if they occur on a "qualified reservation" which is defined in New York Tax Law § 470(16)(a) as "[l]ands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state."

On November 25, 2008, upon application of the law enforcement authorities from the two counties, New York State Supreme Court Justice Kenneth R. Fisher issued search warrants authorizing law enforcement officials to search the two convenience stores owned by the Nation operating under the name "Lakeside Trading" and located in Seneca and Cayuga counties and to seize evidence relating to the possession and sale of unstamped cigarettes and/or business records evincing the receipt and sale of untaxed cigarettes. (Plaintiff's Complaint, R. 111, ¶ 15). The same day, the sheriffs of the respective counties executed the search warrants and seized more than 1.5 million untaxed contraband cigarettes and other evidence. (R. 167, ¶ 8; 172, ¶ 6).

On November 26, 2008, the day after the sheriffs seized the evidence pursuant to the search warrants, the Nation collaterally attacked the criminal proceedings by commencing this civil action in New York State Supreme Court (Monroe County), seeking both declaratory and injunctive relief. (Plaintiff's Complaint, R. 108 et seq.). The Complaint presupposed that the

Nation's purchase of parcels of land on the open market somehow reestablished a historic state reservation that had been created in 1789 and then abandoned two hundred years ago, thereby transforming that land into a "reservation" as that term is used in Tax Law § 470(16)(a). (R. 111, ¶ 4). The Counties responded, in part, on the basis that the Nation's open market purchases of the land after two hundred years of non-Indian ownership and governance did not establish a "qualified reservation" for purposes of Tax Law § 470(16)(a). (R. 20).

By decision of December 9, 2009, New York Supreme Court Justice Kenneth Fisher agreed with the Counties and ruled that the Nation's open market purchases of land did not convert that property into a "qualified reservation" for purposes of Tax Law § 470(16)(a). (R. 18) ("To hold otherwise would be to sanction precisely the result the Supreme Court rejected in *City of Sherrill* [544 U.S. 197 (2005)].") On December 11, 2008, after sealed indictments were handed up in Cayuga County, the Nation filed a notice of appeal in the Appellate Division, Fourth Department from Justice Fisher's judgment. (R. 2).

On July 10, 2009, in a 4-1 ruling, the Appellate Division reversed Justice Fisher's judgment and granted summary judgment in the Nation's favor. (R. 943-959). The court applied federal common law and held that the Nation's recently acquired parcels of land each were located on a "qualified reservation" for purposes of Tax Law § 470(16)(a). (R. 951).

On August 19, 2009, the Counties sought leave to appeal from the order of July 10, 2009, arguing that the Appellate Division's decision was contrary to explicit holdings of the New York Court of Appeals, the United States Supreme Court, the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York. (R. 941-942). On October 2, 2009, the Appellate Division granted the Counties' motion for leave to appeal to the New York Court of Appeals, the state's court of last resort.

Before the Court of Appeals, the Counties argued that federal law, in particular this Court's decision in *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), mandated that the Nation's purchase of land on the open market after two hundred years of non-Indian ownership and local taxation did not rekindle any embers of sovereignty so as to create a "qualified reservation." The Counties also argued that, at any rate, the Nation never possessed a reservation under federal law, thus voiding the Nation's claim *ab initio*.

On May 11, 2010, the Court of Appeals issued a 4-3 decision in the Nation's favor. The Court presupposed, with limited analysis, that the 1794 Treaty of Canandaigua initially granted the Nation a federal reservation by ratifying an existing state reservation and thereby establishing a federal reservation which previously had never existed and that this purported reservation was never formally disestablished.

Apparently overlooking the import of this Court's decision in *City of Sherrill*, the court also held that "the Supreme Court has not yet determined whether parcels of aboriginal lands that were later reacquired by the Nation constitute reservation property in accordance with federal law. Its answer to that question would settle the issue." *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 640 (2010). The court then held that "existing precedent" and "the absence of contrary federal precedent" entitled the lands to a "qualified reservation" status and therefore justified the cigarette sales tax exemption on the Nation's parcels. *Id.*

While the Court of Appeals decision involved the application of New York's tax laws, the court explicitly stated that its decision rested on its interpretation of federal law. *Id.* at 638 ("Viewed in this light, the 'qualified reservation' question distills to whether the convenience store parcels are viewed as reservation property under federal law.").[2] The incorrect application of federal law by the Court of Appeals is therefore ripe for review by this Court and this Court should grant this petition for a writ of *certiorari*. *See Three Affiliated Tribes v. World Engineering, P.C.*, 467 U.S. 138, 152 (1984) ("If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so

2. The Court of Appeals' reliance on federal, as opposed to New York, law to interpret the Tax Law is further evidenced by its rejection of the positions advanced by the New York State Attorney General, the New York City Corporation Counsel, the New York Association of Counties, New York State Senator Jeffrey D. Klein, and the District Attorneys Association of the State of New York.

that the court may reconsider the state-law question free of misapprehensions about the scope of federal law.").

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Decided *Cayuga Indian Nation of New York v. Gould* Under an Incorrect Interpretation of *Sherrill* and Its Progeny.

A. *Sherrill* Rejected Attempts to Revive Tax Exemptions and Other Sovereign Rights on Repurchased Land.

Assuming *arguendo* that the Nation at some time over two centuries ago possessed a federal reservation, which is refuted in Point II, *infra*, federal law holds that an Indian group may not revive reservation status – *and tax exempt rights associated with that status* – simply by purchasing lands on the open market after those lands have been owned by non-Indians and subject to local governance and taxation for centuries.

In *Sherrill*, this Court flatly rejected the Oneida Indian Nation's claim to a tax exempt reservation when it purchased lands on the open market after two hundred years of non-Indian ownership. The Court held that the right to be free from local taxation was reserved only for actual and long-standing Indian reservations. Thus, the parcels at issue were subject to local taxation because under federal law any remnants of sovereignty

or power arising from reservation status had long ago dissipated with the abandonment of the land:

> In this action, [Oneida Indian Nation] seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject the unification theory of OIN and the United States and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

544 U.S. at 213-14.

Sherrill holds that an Indian group's reacquisition of land it has abandoned centuries ago does not revive tax exempt status, much less full sovereignty rights. The oft-debated footnote 9 from the *Sherrill* decision states that such lands are subject to local taxation, regardless whether Congress has *formally* disestablished the ancient reservation. *Sherrill*, 544 U.S. at 216, n.9 ("The Court need not decide today whether . . . the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation . . . The relief [the Oneida Nation] seeks – recognition of present and future sovereign authority to remove the land from local taxation – is unavailable. . . ."). As Justice Stevens persuasively argued, *Sherrill*, in effect, *de facto* disestablishes the ancient reservation. *Sherrill*, 544 U.S. at 225 (Stevens, J., dissenting) ("[*Sherrill*] has effectively proclaimed a diminishment

of the Tribe's reservation and an abrogation of its elemental right to tax immunity."). *Sherrill* holds that purchasing ancient lands yields no special rights, whether these lands are referred to as a reservation or not. Thus, even if Congress has not formally removed the nominal title from ancient tribal lands, an Indian group may not claim tax exempt status on lands it purchases after centuries of non-Indian ownership.

The Court's decision in *Sherrill* was supported by public policy concerns against creating a haphazard "checkerboard" of reservations throughout a state that could otherwise be created at the behest of an Indian group by purchasing ancient aboriginal land on the open market from non-Indians. The Court held that allowing the Oneida Indian Nation to purchase ancient lands at will and thereafter claim tax free status on those lands would overburden state and local governments and neighboring landowners:

> The city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians. A checkerboard of alternating state and tribal jurisdiction in New York State–created unilaterally at [the Oneida Indian Nation's] behest–would seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches.

544 U.S. at 219-20. Thus, "[t]he relief [Oneida Indian Nation] seeks – recognition of present and future sovereign authority to remove the land from local taxation – is unavailable because of the long lapse of

time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender." *Id.* at 216, n.9. That is precisely what the New York State Court of Appeals has done for the Nation.

Sherrill recognized the concerns associated with checkerboard reservations and found that those matters are properly addressed in the land into trust process under 25 U.S.C. § 465. The Court said:

> Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land "shall be exempt from State and local taxation."

Id. at 200. Only after successful completion of the land into trust process may abandoned Indian land be free from local taxation and other regulations.

Short of completing the land into trust process, *Sherrill* and its progeny made clear that Indian groups may not revive any sovereignty rights on repurchased lands. Indeed, *Sherrill* was directly applied to bar the Nation's claims of immunity from zoning laws on repurchased parcels. Specifically, prior to *Sherrill*, the

Nation had argued successfully that its purported reservation lands in Union Springs, Cayuga County, New York were exempt from local zoning laws and that it could therefore operate a gaming establishment on that property. *Cayuga Indian Nation v. Vill. of Union Springs*, 317 F. Supp.2d 128 (N.D.N.Y. 2004) ("*Union Springs I*"). After *Sherrill*, however, the United States District Court for the Northern District of New York reversed its earlier decision and held that the Nation was not accorded any such rights on repurchased land. *Cayuga Indian Nation v. Vill. of Union Springs*, 390 F. Supp.2d 203 (N.D.N.Y. 2005) ("*Union Springs II*").

The United States Court of Appeals for the Second Circuit likewise held that *Sherrill* compelled reversal of the Nation's possessory land claim. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 272 (2d Cir. 2005). The Second Circuit held that "[t]he Supreme Court's recent decision in [*Sherrill*] has dramatically altered the legal landscape against which we consider plaintiffs' claims." *Id.* As it did in *Cayuga Indian Nation of New York v. Gould*, the United States submitted briefs on the Nation's behalf in *Union Springs II* and *Pataki*. The federal courts in *Union Springs II* and *Pataki* rejected the positions advanced by the United States and the Nation in light of *Sherrill* while the New York Court of Appeals accepted those positions in the instant case despite *Sherrill*, effectively reversing this Court's prior decision.

B. The Court of Appeals Rejected the Plain, Unambiguous Holding of *Sherrill* When it Granted the Nation a Tax Exemption.

The Court of Appeals held that whether the Nation's two convenience stores were each located on a "reservation" presented "a critical threshold consideration." *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 635 (2010). The court determined that federal law – not state law – governed the question of "reservation" status. Indeed, state law would have settled the issue in the Counties' favor because the term "reservation" has been used in other long-standing New York State tax statutes, specifically Real Property Tax Law § 454 and Indian Law § 6, and the New York State Legislature has determined that the Nation's parcels do not constitute a "reservation" under either statute. Each of the Nation's parcels is assessed, and the Nation pays the corresponding real property taxes, despite express statutory exemptions for "reservation" land under these statutes. Under the rule of construction known as *in pari materia*, the Nation's payment of real property taxes under these statutes confirms that neither parcel is a "reservation" as that term is used in the New York Tax Law. Thus, as a matter of state law, the Nation possesses no "reservation" under Tax Law § 470(16)(a). Counties' Principal Brief to Court of Appeals, at 22-32; Counties' Reply Brief to Court of Appeals, at 6-16.

The Court of Appeals found state law irrelevant to its analysis, holding instead that the "question distills to whether the convenience store parcels are viewed as reservation property under federal law." *Cayuga Indian*

Nation of New York, 14 N.Y.3d at 638. According to the Court of Appeals, "the Supreme Court has not yet determined whether parcels of aboriginal lands that were later reacquired by the Nation constitute reservation property in accordance with federal law. Its answer to that question would settle the issue." *Id.* at 640. The court nevertheless found in the Nation's favor "based on existing precedent" and what it mistakenly perceived as "the absence of contrary federal authority." *Id.*

Contrary to the holding of the Court of Appeals, under *Sherrill*, *Union Springs II*, and *Pataki*, the Nation's parcels are subject to local taxation – including the cigarette excise and sales taxes – under a federal law analysis. Indeed, the Nation's parcels were owned by non-Indians and have been subject to local governance and taxation for an even longer period than the land at issue in *Sherrill*. Thus, as noted by New York Supreme Court Justice Fisher in his decision below:

> After these cases, and in particular [*Union Springs II*], [the Nation's] current claim that their convenience stores in Seneca and Cayuga Counties are situate on a 'qualified reservation' land such that they have sovereign immunity from local taxation . . . cannot be sustained . . . To hold otherwise would for the Cayuga Indian Nation render meaningless the holdings of *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266

(2d Cir. 2005) *cert. den.*, 547 U.S. 1128 (2006); and especially *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F.Supp.2d 203 (N.D.N.Y. 2005).

(Justice Fisher Decision, R. at 24-25.)

The Court of Appeals, however, disagreed with Justice Fisher and held that the Nation's repurchased lands were accorded an exemption from New York State's cigarette sales tax. In so doing, that court disregarded, or plainly misapplied, *Sherrill* and its progeny. The Court of Appeals focused on the fact that the Nation claimed only a cigarette tax exemption rather than full sovereignty over the parcels. By finding in the Nation's favor based on this distinction, the Court of Appeals completely overlooked that *Sherrill* had already decided that reacquired historic lands were not accorded *any* special privileges, much less a special exemption from local taxes. Simply put, *Sherrill* held that the Nation's repurchasing of abandoned lands yielded no special rights or privileges vis-à-vis such lands absent a successful land into trust application.

Whereas *Sherrill*, at footnote 9, holds that repurchased parcels are subject to local taxation even without formal disestablishment, the Court of Appeals misconstrued this principle, holding that the Nation's parcels retain nominal federal "reservation" status for purposes of a tax exemption. Completely undermining *Sherrill*, the New York State court held that without formal disestablishment, the Nation's parcels were therefore exempt from New York's cigarette sales tax because they were purportedly on federal reservation land.

That holding is untenable. The decision results in a prohibited "checkerboard" of reservations and non-reservations throughout upstate New York, which the Nation may create at its behest when it repurchases any land within its purported historic claim to a massive tract of over 64,000 acres of land. That policy was flatly denounced by this Court in *Sherrill*. Unchecked development of new tax exempt havens would upset existing neighborhoods and communities and sanction cigarette sales in areas where the interest of local municipalities is paramount, such as locations near schools. The haphazard establishment of reservations on long-ago abandoned land and the rights associated with those reservations increases the tax burden on all other property owners in the taxing jurisdiction and creates a stress on any business that attempts to compete with reservation vendors who sell tax free cigarettes. Counties' Principal Brief to Court of Appeals, at 32-33.

The Court of Appeals also misapplies *Sherrill* by relying on the Nation's application to place the parcels at issue into trust with the federal government. According to the Court of Appeals, the Nation's application demonstrates that it constitutes a federal reservation exempt from New York's cigarette sales tax. Contrary to the Court of Appeals' decision, however, *Sherrill* holds that only successful completion of the land into trust process would provide that the Nation's parcels are no longer subject to state and local taxation. The Nation has not completed that process here, and the Court of Appeals has instead bypassed *Sherrill*'s requirements.

This Court should also grant *certiorari* to review the decision below because *Sherrill* has recently come under attack from other courts, a trend that threatens to continue. In *Oneida Indian Nation v. Madison County and Oneida County*, 605 F3d 149 (2d Cir. 2010), the United States Court of Appeals for the Second Circuit held that local municipalities may not foreclose on the Oneida Indian Nation's repurchased lands if the Oneidas fail to pay real property taxes associated with those lands, taxes that are properly assessed and owing in accordance with *Sherrill*. Even though the Second Circuit's holding primarily involves questions of immunity from suit, its decision effectively grants sovereignty rights, the right to avoid paying property taxes, on the parcels at issue. As does the New York Court of Appeals in *Cayuga Indian Nation of New York v. Gould*, the Second Circuit has effectively undermined *Sherrill* and its progeny. Recognizing the inherent conflict with the Court's decision in *Sherrill*, Judge Cabranes and Judge Hall write in their concurring opinion, "This result, however, is so anomalous that it calls for the Supreme Court to revisit [its prior decisions] . . . If law and logic are to be reunited in this area of law, it will have to be done by our highest Court . . . ." *Id.* at 162.

Because the New York Court of Appeals has misinterpreted federal law and the concept of rights associated with abandoned tribal lands, the Counties respectfully submit that this Court should review that court's decision in *Cayuga Indian Nation of New York v. Gould* and reaffirm the principle holding of *Sherrill* that an Indian group may not rekindle any embers of sovereignty – and specifically the right to avoid local taxation – through open market purchases of ancient land that the Indian group has long ago abandoned.

II. The Court of Appeals Incorrectly Applied Federal Treaties and Statutes in *Cayuga Indian Nation of New York v. Gould* and Mistakenly Concluded that a Federal Cayuga Reservation Exists.

Even if the Nation could rekindle sovereignty on its repurchased lands after two hundred years of non-Indian ownership and possession, no authority supports the argument that the land at issue was ever part of a federal reservation. Moreover, even if one were to assume that there was a federal Cayuga reservation at some point in time, any such reservation has in any event been disestablished. There is no present-day federal Cayuga reservation.

A. The Nation Never Possessed a Federal Reservation.

The New York Court of Appeals begins its analysis of the history relevant to the purported existence of a federal reservation by discussing the 1794 Treaty of Canandaigua, but, as the Counties argued to the court below, one cannot properly analyze whether there ever was a federal reservation without going further back in time. *See* Counties' Principal Brief to Court of Appeals, at 22, Counties' Reply Brief to Court of Appeals, at 17. On February 25, 1789, the Cayugas and New York State signed a treaty, the first paragraph of which states: "First: the Cayugas do cede and grant all their lands to the people of the State of New York, forever." The only interest the Cayugas held in any portion of the ceded lands after 1789 was a limited land use right granted by the State in the second article of the treaty: "Secondly: the Cayugas shall, of the said ceded lands, hold to

themselves, and to their posterity, forever, for their own use and cultivation, but not to be sold, leased, or in any other manner aliened, or disposed of to others, all that tract of land, beginning at . . . ." By the express terms of the treaty, the Cayugas ceded their lands to the State, which then granted to the Cayugas a right of "use and cultivation" in the same. Importantly, in the 1789 Treaty, New York State reserved for itself the exclusive right to purchase back the reservation it had created. *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268-69 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006).

The United States Constitution took effect and the United States government began functioning as a federal government on March 4, 1789 – after the 1789 Treaty was signed on February 25, 1789. *See e.g.*, *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079 n.6 (2d Cir. 1982). The Articles of Confederation did not prohibit or require the assent of Congress for the transfer of Indian land. *See Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1167 (2d Cir. 1988). As a result, at the time of the 1789 Treaty, New York could – and did – lawfully exercise its right to extinguish whatever interests the Cayugas had in the subject land. *See id.* The United States itself put forth exactly this argument before the American and British Claims Arbitration Tribunal in 1926, and the Tribunal concluded that the 1789 treaty "was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown," and that "[t]he title of New York . . . was independent of and anterior to the Federal Constitution." *Cayuga Indian Claims*, 20 AM. J. INT'L L. 574, 590, 591 (Am. & Br. Claims Arb. Trib. 1926); Counties' Reply Brief to Court of Appeals at 18 n.7.

The Court of Appeals, however, now holds that in the 1794 Treaty of Canandaigua, the United States recognized that the Cayuga Indian Nation possessed a federal reservation. This holding is incorrect. In fact, the United States merely acknowledged that the Cayugas had certain land use rights derived from the 1789 Treaty with New York. The Treaty of Canandaigua did not establish any new rights, much less a federal reservation. Article II of the Treaty of Canandaigua provides in full:

> The United States *acknowledge* the lands reserved to the Oneida, Onondaga and Cayuga Nations, *in their respective treaties with the state of New York*, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

7 Stat. 44, Art. II (emphasis added). As is apparent from this language, the United States did not purport to reserve any land by virtue of the Treaty of Canandaigua in 1794; it merely "acknowledged" that New York reserved certain rights to the land for the Cayugas after it extinguished whatever Indian title the Cayugas held. Similarly, the United States did not purport to create a reservation by virtue of the Treaty of Canandaigua, but merely acknowledged that the lands constituted a state

reservation under the 1789 Treaty with New York and promised not to disturb the Cayugas' use of the land pursuant to that treaty.

The Treaty of Canandaigua did not convey an interest in land to the Cayugas and did not divest New York of its rights. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 922 n.5 (1965) (explaining that the purpose of the Treaty of Canandaigua was to "reconfirm peace and friendship between the United States and the Six Nations . . . . [T]here was no purpose to divest New York and Massachusetts of their right, nor was there any purpose to prevent or to supervise sales or transfers of [subject] territory."). The New York Court of Appeals' construction of the Treaty of Canandaigua is erroneous because the United States did not have the power to grant or confirm a title to land when the sovereignty and dominion over it had become vested in New York State. *See Goodtitle v. Kibbe*, 50 U.S. 471, 478 (1850) (holding that Congress could not grant an interest in land that belonged to Alabama). After 1789, New York held the land in fee subject only to limited use rights granted to the Cayugas pursuant to state law. The federal government had no property rights in the lands and could not confer "recognized title" without illegally depriving New York of its property rights.

Although the Supreme Court has not held that the treaty making power of the United States extends to the divestment of a state's interest in land, it has observed that if such authority were to exist, it must be shown unmistakably in the treaty. *United States v. Minnesota*, 270 U.S. 181, 209 (1926) ("[N]o treaty should

be construed as intended to divest rights of property – such as the state possessed in respect of these lands – unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question."). The Treaty of Canandaigua makes no mention of an intent to divest New York of its property rights, and there is no historical evidence that the federal government intended the Treaty to divest New York of its interest. Indeed, the language of the Treaty of Canandaigua confirms that the United States explicitly acknowledged New York State's treaty with the Cayugas.

If, as the New York Court of Appeals contends, the Treaty of Canandaigua established a federal Cayuga reservation, then in so doing the United States violated the Fifth Amendment to the Constitution. The United States' power of eminent domain extends to the taking of state-owned property without the state's consent, but the United States must pay just compensation to the property owner for the property it takes. U.S. CONST. AMEND. V; *see also Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983). A compensable taking occurs "[i]f a government has committed or authorized a permanent physical occupation of [the] property." *Southview Assocs. v. Bongartz*, 980 F.2d 84, 92-93 (2d Cir. 1992). Under this standard, if by the Treaty of Canandaigua the United States took New York's property rights in the subject lands, then New York State would have been entitled to compensation for that taking. No such compensation was ever given. Because compensation was never paid to New York, even if the Unites States attempted to effect a taking by the Treaty of Canandaigua, it was

incomplete and no property interest passed to the Cayugas. *See United States v. Dow*, 357 U.S. 17, 21 (1958) (holding that title does not pass until the owner receives compensation).

B. If a Federal Reservation Ever Existed, It Has Been Disestablished.

Even if this Court agrees with the New York Court of Appeals that the United States created a federal reservation by the Treaty of Canandaigua, it should find that any such reservation was disestablished when the Cayugas twice sold in 1795 and 1807 to New York State whatever land use rights they had in the subject land. The July 27, 1795 Treaty between the Cayugas and New York State provides:

> [I]t is Covenanted, stipulated and agreed by the said Cayuga Nation that they will sell . . . to the People of the State of New York all and singular the Lands reserved to the use of the said Cayuga Nation . . . to have and to hold the same to the People of the State of New York and to their Successors forever . . . .

The May 30, 1807 Treaty between the Cayugas and New York State, further provides:

> [T]he said Cayuga Nation for and in consideration of the sum of Four thousand eight hundred dollars . . . Do sell and release to the people of the State aforesaid all their right title Interest possession property claim and demand whatsoever of in and to the said

> . . . Land . . . commonly called the Cayuga Reservations . . . which two reservations contain all the land the said Cayuga Nation claim or have any interest in in this State To have and to hold the said Two tracts of Land as above described unto the People of the State of New York and their Successors forever.

The Court of Appeals held that these conveyances violated the federal restriction on the alienability of Indian lands contained in the Nonintercourse Act ("NIA"). That holding is wrong. The NIA applied by the courts whose decisions the Court of Appeals cited was not the law in effect at the time of the alleged violations and did not include a key provision that the relevant statutes included. *See Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 317 F. Supp.2d 128 (N.D.N.Y. 2004) and *Cayuga Indian Nation of N.Y. v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990) (both holding that the 1795 and 1807 conveyances of land to New York were invalid under the Nonintercourse Act, 25 U.S.C. § 177). In fact, Indian Trade and Intercourse Acts (TIAs) of 1793 and 1802 are the applicable statutes under which the use rights were purchased by New York in 1795 and 1807, respectively. Each of these TIAs has a provision indicating that the statute was meant to govern interstate commerce and not intrastate sales: "That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the [ordinary] jurisdiction of any of the individual states." *See* 1793 TIA, sec. 13; 1802 TIA, sec. 19. Thus, under applicable law, the 1795 and

1807 conveyances did not violate any restriction because they were not barred by the statute.

Although the Counties maintain that no federal Cayuga reservation was ever created and there was, therefore, no restriction at all on the alienability of the lands transferred in 1795 and 1807, the transactions nonetheless complied even with the current version of the NIA because they were approved by the federal government.

The NIA prohibits the purchase or grant of lands from any Indian Nation "unless the same shall be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. The plain language of the statute indicates that ratification by the federal government through formalities of the Treaty Clause is not the sole source of federal approval for agreements between states and Indian tribes. Indeed, this Court's decision in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 248 (1985), holds only that federal approval must be "plain and unambiguous." It says nothing about the form such "plain and unambiguous" consent must take. *See Cayuga Indian Nation v. Cuomo*, 667 F. Supp. 938, 944 (N.D.N.Y. 1987) (noting that the U.S. Supreme Court could have, but "did not set down an unequivocal rule that any conveyance of Indian land must be by express federal treaty in order to comply with the Nonintercourse Act").

Under the applicable "plain and unambiguous" standard, the federal government's involvement in the negotiation, consummation and subsequent implementation of the 1795 and 1807 conveyances

constituted federal ratification of those treaties. Not only did federal officials actively participate in the treaty process and attend the negotiations and signing of the 1795 and 1807 treaties, but the federal government distributed New York's payments to the Cayugas. *See Cayuga Indian Nation of New York v. Cuomo*, 730 F. Supp. 485, (N.D.N.Y. 1990) (discussing involvement of federal officials Jasper Parrish and Israel Chapin Jr. in the negotiation and signing of the 1795 and 1807 treaties and Parrish's transmittal of consideration paid by New York State to the Cayugas for the acquisition of the Cayuga land); *Cayuga Indian Nation v. United States*, 36 Ind. Cl. Comm. 75, 92, 96 (1975) (noting that Parrish and Chapin signed the 1795 treaty and that Parrish attended the signing of the 1807 treaty as the United States Superintendent of Indian Affairs). The conduct of the federal government throughout the negotiation and implementation of both treaties demonstrates federal acquiescence to the conveyances, and the conveyances, therefore, were valid and did not violate the NIA.

In 1910, the United States and Great Britain entered into an agreement to establish an arbitral tribunal to resolve certain claims between the two governments. Among these was a claim by Great Britain on behalf of the Cayuga Indians of Canada, related to New York State's refusal to pay part of the annuity provided for by the 1795 Treaty to the Canadian Cayugas. *See Cayuga Indian Claims*, 20 AM. J. INT'L L. 574, 576 (Am. & Br. Claims Arb. Trib. 1926). The agreement and the list of claims to be resolved were approved by the Senate. By this agreement, the United States recognized that the obligations under the 1795

Treaty were enforceable and could be adjudicated in an international forum. In 1926, the American and British Claims Arbitration Tribunal published its decision requiring the United States to pay $100,000 to Great Britain as trustee for the Canadian Cayugas. *See id.* at 594. Thereafter, President Coolidge, with the approval of both houses of Congress, included in the federal government's budget the funds required to pay the award. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. at 492. By payment of the Tribunal's award, the federal government plainly and unambiguously recognized the 1795 Treaty as a valid conveyance and therefore the source of its liability.

C. The Treaty of Buffalo Creek Confirmed That No Federal Reservation Existed.

In deciding whether the Nation has ever possessed a federal reservation which remains in place, the New York Court of Appeals, citing the Second Circuit's decision in *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 269 n.2 (2d Cir. 2005), noted that that "the Treaty of Buffalo Creek neither mentions Cayuga land or Cayuga title in New York, nor refers to the 1795 or 1807 treaties between New York and the Cayuga." However, the Court of Appeals' conclusion that there is a federal Cayuga reservation which has not been disestablished does not follow. The Treaty of Buffalo Creek confirms the Counties' assertion that the Cayuga reservation was either never established as a federal reservation or had long been disestablished by the time of the Treaty of Buffalo Creek in 1838. Had there been a federal Cayuga reservation in existence at the time of the Treaty of Buffalo Creek, that treaty would have

specifically mentioned any such reservation either as land to which rights were being relinquished or land to which Indians reserved rights. Instead, the Treaty of Buffalo Creek provides for compensation of the Cayugas upon their removal from New York State to the west, and refers to the Cayugas as "friends" of the Senecas. With no Cayuga reservation for the Treaty to address specifically, it simply recognizes Cayugas and Onondagas "residing among [the Senecas]". The Treaty of Buffalo Creek is the ultimate evidence that, at least as of 1838, the federal government did not believe a federal Cayuga reservation existed.

CONCLUSION

For the foregoing reasons, there exist important issues of federal law that need to be determined by this Court and the petition for a writ of *certiorari* should therefore be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK DECIDED MAY 11, 2010

COURT OF APPEALS OF NEW YORK

No. 74

Cayuga Indian Nation of New York,

Plaintiff-Respondent,

v.

Cayuga County Sheriff David S. Gould, et al.,

Defendants-Appellants.

GRAFFEO, J.:

In this appeal involving a dispute between law enforcement authorities and the Cayuga Indian Nation concerning the collection of cigarette sales taxes, two principal issues are presented. The first is whether the Cayuga Indian Nation was entitled to a declaration that two convenience stores it operates in Central New York are located on "qualified reservation" property within the meaning of Tax Law § 470(16)(a). The second is whether, absent the implementation of a statutory or regulatory scheme addressing the specific tax collection issues posed by the retail sale of cigarettes on Indian reservations, Nation retailers can be prosecuted for the possession and sale of untaxed cigarettes under Tax Law § 471.

Appendix A

I. *The background of this dispute*

The current controversy between the Cayuga Indian Nation and law enforcement authorities in Seneca and Cayuga Counties cannot be resolved without an understanding of New York State's past efforts to collect taxes derived from the retail sale of cigarettes on Indian reservations. Since 1939, New York has imposed sales taxes on cigarettes sold in this state under Tax Law § 471, which generally requires the use of tax stamps that are purchased by cigarette wholesalers and then affixed to packages of cigarettes. Under the statute, the "agent" — typically the wholesaler — "is liable for the collection and payment of the tax on cigarettes . . . and shall pay the tax to the tax commission by purchasing" tax stamps (Tax Law § 471[2]). Having prepaid the sales taxes, wholesalers pass the tax obligation on to distributors who, in turn, collect the taxes from retailers, until they are finally paid by consumers. Thus, the "ultimate incidence of and liability for the tax [falls] upon the consumer" (Tax Law § 471[2]). Tax Law § 1814 declares that it is a misdemeanor to willfully evade the cigarette tax.[1]

Tax Law § 471 recognizes that there are certain instances when the state must forego cigarette tax collection because it is "without power to impose such tax." At the time of its enactment in 1939, one of those

1. Depending on the quantity of cigarettes involved and whether the offender has prior violations, evasion of cigarette sales taxes can constitute a felony (Tax Law § 1814[a]-[c]).

situations included the sale of cigarettes occurring on Indian reservations since states were not authorized to tax goods sold by an Indian Nation on its reservation until 1976. That year the United States Supreme Court decided *Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation* (425 US 463, 483, 96 S. Ct. 1634, 48 L. Ed. 2d 96 [1976]), which held that states may impose sales taxes on goods sold by members of an Indian nation on reservation land to purchasers who are not members of the nation, particularly when it is the non-Indian purchaser who bears the ultimate tax burden under state law.

In the aftermath of *Moe*, in 1988 the New York Department of Taxation and Finance promulgated regulations aimed at implementing a scheme to calculate and collect the sales taxes due from sales to non-Indians on reservation properties in New York. The regulations adopted a "probable demand" mechanism that limited the quantity of unstamped — i.e., "untaxed" — cigarettes that wholesalers or distributors could sell to tribes and tribal retailers. The Department would either project the "probable demand" for cigarettes attributable to members of a particular Indian tribe or nation, thereby restricting the quantity of unstamped cigarettes that could be sold to that tribe or nation to that estimated number, or enter into agreements with tribal leaders to determine probable demand. Tax exemption coupons would be issued to Indian retailers representing their monthly allotment under the probable demand formulation and the retailers could then exchange those coupons with wholesalers for

unstamped cigarettes. Retailers were to sell unstamped cigarettes only to "qualified Indians," who would be provided with individual exemption certificates to present to retailers when purchasing cigarettes.

The 1988 regulations were never implemented by the Department, however, because the proposed tax collection scheme was immediately challenged by cigarette wholesalers who claimed the regulations were preempted by federal statutes governing trade with Indians. The litigation proceeded to the United States Supreme Court, which ultimately rejected the wholesalers' contention in 1994 (*see Department of Taxation and Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 114 S. Ct. 2028, 129 L. Ed. 2d 52 [1994]). The Supreme Court reaffirmed the principle articulated in *Moe* and further declared that "States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians." (*id.* at 73). Thus, the Court recognized the authority of states to collect sales taxes relating to cigarettes sold to non-Indians on reservation property or other Indian lands provided the regulatory scheme is not "unduly burdensome" (*id.* at 76).

After analyzing New York's regulations, the *Milhelm* Court concluded that they were not preempted by federal laws regulating Indian trading, but it did not "assess for all purposes each feature of New York's tax enforcement scheme that might affect tribal self-government or federal authority over Indian affairs" (*id.* at 69). Without endorsing every aspect of the New

York approach, the Supreme Court approved in principle the "probable demand" methodology, while acknowledging that an "inadequate quota may provide the basis for a future challenge to the application of the regulations" (*id.* at 75). The Court emphasized that "[i]f the Department's 'probable demand' calculations are adequate, tax-immune Indians will not have to pay New York cigarette taxes and neither wholesalers nor retailers will have to precollect taxes on cigarettes destined for their consumption" (*id.*).[2] Finally, the Court concluded that the record-keeping requirements imposed under the regulations were less onerous than comparable provisions that had been upheld in *Moe* and would not impermissibly interfere with Indian trading activities (*id.* at 76).

Because *Milhelm* was commenced by non-Indian wholesalers, the Supreme Court addressed the narrow preemption issue before it and did not fully explicate the interests of Indian nations or tribes affected by the regulations (*id.* at 68-70). Although it rejected the wholesalers' facial challenge to the regulations, the Court was clearly aware of the enforcement difficulties that states faced when attempting to collect sales taxes directly from Indian tribes given their immunity from

2. This appears to have been an important consideration in the Court's decision to sustain the regulations as it restated this proposition later in the opinion (*see Milhelm*, 512 U.S. at 76 ["assuming that the 'probable demand' calculations leave ample room for legitimately tax-exempt sales, the precollection regime will not require prepayment of any tax to which New York is not entitled"]).

civil suits for nonpayment; it acknowledged that tax collectors must employ "alternative remedies" to ensure compliance, such as entering into agreements with the tribes, pursuing civil damages actions against individual members or engaging in off-reservation interdiction efforts (*id.* at 72).

Enforcement of the regulations was stayed during the course of the *Milhelm* litigation but the release of the decision in June 1994 seemingly paved the way for implementation. But, soon after *Milhelm* was decided, the Department announced that enforcement efforts would be delayed pending consideration of other issues arising from the decision and to allow for negotiations with the tribes in an attempt to enter into compacts or agreements pertaining to the collection of sales taxes. When the regulations had still not been put into effect more than a year later, an association of convenience store owners commenced an action in 1995 to compel enforcement of these regulations and similar provisions relating to sales taxes on motor fuel (*see Matter of New York Assn. of Convenience Stores v Urbach*, 92 NY2d 204, 699 N.E.2d 904, 677 N.Y.S.2d 280 [1998]). The Association claimed that the equal protection rights of its members had been violated by the state's selective enforcement of cigarette and gasoline sales taxes and the policy of forbearance against Indian retailers who were selling untaxed cigarettes and gasoline to non-Indians at reservation stores.

Although the Association prevailed in the lower courts, which employed a strict scrutiny analysis in

finding that the forbearance policy amounted to unlawful discrimination, this Court rejected that argument, concluding that distinctions between sales on Indian reservations and other types of sales did not implicate invidious racial classifications because of the unique status enjoyed by Indian tribes under federal law. We held that the classification should be subjected to the rational basis test, rather than strict scrutiny, but we did not proceed to apply that test since state policy had changed during the course of the litigation. Although the Department's policy of forbearance had initially been temporary, by the time the case was argued in this Court, it had become permanent — the Department announced in 1998 that it was repealing the regulations. In its notice of repeal, the Department explained that, as a practical matter, the regulations could not achieve their intended purposes and that repeal was predicated on the "State's respect for the Indian Nations' sovereignty" (*id.* at 214, quoting 20 NYS Reg, Apr. 29, 1998, Issue 17, Book 1, at 23). "Since these rules provide the only regulatory framework for enforcing the motor fuel and cigarette taxes on Indian reservations, their repeal signified that the Tax Department has committed itself to withholding active enforcement on a long-term basis" (*New York Assn. of Convenience Stores*, 92 NY2d at 214). In light of this pronouncement, we remitted the case to the lower courts to assess, in the first instance, whether the now-permanent forbearance policy met the rational basis standard.

On remittal, both Supreme Court and the Appellate Division concluded that it did. The Appellate Division explained:

> "The record . . . makes plain that the statutes cannot effectively be enforced without the cooperation of the Indian tribes. Because of tribal immunity, the retailers cannot be sued for their failure to collect the taxes in question, and State auditors cannot go on the reservations to examine the retailers' records. Additionally, the Department cannot compel the retailers to attend audits off the reservations or compel production of their books and records for the purpose of assessing taxes. In that regard, representatives of the Department engaged in extensive negotiations with the tribes in an effort to arrive at an acceptable agreement. Those efforts were largely unsuccessful and the vast majority of the Indian retailers refused to register with the Department. In further efforts to enforce the statute, the State attempted interdiction, i.e., interception of tobacco and motor fuel shipments and seizure of those shipments that were found to be in noncompliance with the Tax Law. That strategy resulted in civil unrest, personal injuries and significant interference with public transportation on the State highways. In our view, all of these factors provide a rational basis for the differential treatment of the parties" (*Matter of New York Assn. of Convenience*

Stores v Urbach, 275 AD2d 520, 522-523, 712 N.Y.S.2d 220 [3d Dept 2000], *lv denied* 96 N.Y.2d 717, 756 N.E.2d 78, 730 N.Y.S.2d 790 [2001], *cert denied* 534 U.S. 1056, 122 S. Ct. 647, 151 L. Ed. 2d 564 [2001]).

The next significant policy shift occurred in 2003 when the Legislature adopted Tax Law § 471-e, which directed the Department to issue whatever regulations would be necessary to collect cigarette taxes on reservation sales to non-Indians (see former Tax Law § 471-e; L 2003, ch 63, pt Z, § 4).[3] As a result, the Department drafted a new set of regulations but they were never formally adopted. Consequently, in 2005, the Legislature amended Tax Law § 471-e by declaring that "qualified Indians" have a right to purchase tax exempt cigarettes on the "qualified reservation" of their tribe or nation for their own consumption. The statute further clarified that "non-Indians making cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within this state" (Tax Law § 471-e[1]; *see* L 2005, ch 61, pt K, §§ 1-2, as amended by L 2005, ch 63, pt. A, § 4

3. Former Tax Law § 471-e provided: "Where a non-native American person purchases, for such person's own consumption, any cigarettes or other tobacco products on or originating from native American nation or tribe land recognized by the federal government and reservation land recognized as such by the state of New York, the commissioner shall promulgate rules and regulations necessary to implement the collection of sales, excise and use taxes on such cigarettes or other tobacco products" (L 2003, ch 63, pt Z, § 4).

[a 2004 attempt to enact similar legislation had been foiled by gubernatorial veto]).

The amendment also incorporated the Department's proposed regulations into Tax Law § 471-e, thereby creating a statutory mechanism for calculating and collecting sales taxes relating to on-reservation purchases by non-Indians. Although it differed from the 1988 regulatory scheme, Tax Law § 471-e also used a coupon system as the mechanism of enforcement. The Department was required to determine the "probable demand" for cigarettes by tribal members through various means (including potential agreements with the tribes) and periodically issue to the governing body of a tribe tax exemption coupons representing the amount of cigarettes likely to be consumed by tribal members each quarter. Cigarette wholesalers were to pay the sales taxes on all cigarettes in their possession, meaning all packages were to bear tax stamps, even those destined for on-reservation sales to tribe members. A tribe could purchase cigarettes for use by members without paying sales taxes by proffering tax exemption coupons provided by the Department. The wholesaler, in turn, would use the coupons to obtain a refund from the Department for its overpayment of cigarette taxes (the wholesaler would have already paid the sales taxes on the cigarettes it provided to the tribes in exchange for the coupons).[4]

4. In this significant respect, the tax collection methodology codified in 2005 in Tax Law § 471-e differed from the system

(Cont'd)

Appendix A

The effective date provision applicable to Tax Law § 471-e (L 2005, ch 63, pt A, § 4, amending L 2005, ch 61, pt. K, § 7) directed that the statute "shall take effect March 1, 2006, provided that any actions, rules and regulations necessary to implement the provisions of this act on its effective date are authorized and directed to be completed on or before such date." But the Department did not meet this deadline. It did not make the "probable demand" calculations or issue the tax exemption coupons that were integral to the tax collection methodology. In a March 16, 2006 advisory opinion, the Department explained that it intended to continue its policy of forbearance, meaning that it would not actively attempt to collect from wholesalers, distributors or Indian retailers, cigarette sales taxes associated with on-reservation sales (*see* NY St Dept of Tax & Fin Advisory Op No. TSB-A-06[2]M). The Department further advised that, if it "revise[d] its policy in the future, it [would] provide adequate notice to all affected stamping agents" (*id.*)

Soon after the proposed effective date passed, a cigarette wholesaler and a tribal retailer initiated a declaratory judgment action against the State and the Attorney General (who had threatened to enforce the

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adopted in the 1988 regulations. The statute requires prepayment of taxes on cigarettes ultimately involved in tax-exempt sales, in contrast to the 1988 regulations which, as emphasized in *Milhelm*, did not require wholesalers to prepay taxes on cigarettes destined for consumption by tax-exempt Indian purchasers (*see Milhelm*, 512 U.S. at 75, 76).

statute, despite the Department's forbearance policy) seeking a determination that the amended version of Tax Law § 471-e was not enforceable, together with a preliminary injunction precluding any enforcement efforts. Supreme Court granted the preliminary injunction, reasoning that the statute was not in effect because the conditions precedent in the effective date provision had not been fulfilled and, in May 2008, the Appellate Division agreed (*see Day Wholesale, Inc. v State of New York*, 51 AD3d 383, 856 N.Y.S.2d 808 [4th Dept 2008]). The appellate court noted:

> "there is no question that the Legislature intended to create a procedure that would permit the State to collect cigarette taxes on reservation sales to non-Indians and non-members of the nation or tribe while simultaneously exempting from such tax reservation sales to qualified Indian purchasers. Because both aspects of the procedure must function simultaneously, the Legislature provided for a system utilizing Indian tax exemption coupons to distinguish taxable sales from tax-exempt sales. Without the coupon system in place, cigarette wholesale dealers and reservation cigarette sellers have no means by which to verify sales to tax-exempt purchasers" (*id.* at 387).

The preliminary injunction issued in *Day* has not been disturbed and the parties in this case agree that Tax Law § 471-e is not "in effect" and therefore remains

unenforceable.[5] Thus, at present, there is no enforceable statutory or regulatory scheme specifically addressing the calculation or collection of taxes arising from the on-reservation retail sale of cigarettes. Moreover, the Department — the agency charged by the Legislature with the collection of the taxes — has not to date implemented a system that uses Indian retailers as an intermediary for collection of cigarettes sales taxes from consumers.[6]

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5. The decision in *Day* is not before this Court for review and we express no view on the issue presented in that case. For purposes of this appeal, we merely assume, as do the parties and the dissent, that Tax Law § 471-e is not "in effect."

6. While this appeal has been pending before us, the Department of Taxation and Finance has announced a change in policy. On February 23, 2010, it withdrew its March 16, 2006 Advisory Opinion and announced new proposed regulations that, when implemented, will impose a tax exemption coupon system for the collection of sales taxes. Notably, one of the proposed regulations assumes that the Cayuga Indian Nation has a reservation and is selling cigarettes on that property since it includes the Cayuga among the list of tribes for whom "the probable demand of the qualified Indians on the nation's or tribe's qualified reservation" must be calculated and makes a preliminary calculation of the Nation's probable demand (*see* proposed 10 NYCRR 74.6[f][2], [f][2][1]). This development does not moot the issues presented in this case, however, since defendants' enforcement efforts are predicated on alleged past violations of the Tax Laws and the proposed regulations will not become effective until completion of the formal procedure required under the State Administrative Procedure Act.

Appendix A

Against this historical synopsis, we turn to the facts giving rise to this controversy.

II. *This litigation*

Plaintiff Cayuga Indian Nation operates two convenience stores in Cayuga and Seneca Counties on parcels of real property it purchased on the open market in 2003. The parcels are situated on what had been the Nation's approximately 65,000-acre aboriginal reservation but, by 1807, title to all of this reservation property had been transferred to the State and subsequently purchased by private successors in interest. The Nation acknowledges that it sells cigarettes on these properties both to its tribal members and non-Indian consumers and that the cigarettes do not bear tax stamps evidencing payment of New York cigarette sales taxes. For purposes of this litigation, it is also undisputed that Nation retailers at these two locations are involved in retail sales to consumers — not cigarette wholesaling activities.

In September 2008, the District Attorneys of Seneca and Cayuga counties wrote to the Commissioner of Taxation and Finance requesting the Department's assistance in preventing the sale of untaxed cigarettes and other products by the Nation's retailers. In response, the Commissioner advised: "Governor Paterson is currently engaged in discussions with New York's Native American nations and tribes in an effort to resolve the many complex and important issues that have confounded multiple administrations for decades.

Given these circumstances, we are constrained not to participate in your investigations." The Commissioner further expressed the "hope" that they would "exercise care to avoid taking actions that might disrupt or undermine the Governor's current global negotiations."

Dissatisfied with the Department's response, law enforcement authorities in both counties decided to pursue their own enforcement efforts. In November 2008, they obtained and executed search warrants in both stores operated by the Nation, confiscating the inventories of unstamped cigarettes, among other items. At that time, no criminal action had been commenced against the Nation, any of its members or any other individual in connection with the sale of cigarettes at the convenience stores.

The day after the warrants were executed, the Cayuga Indian Nation brought this declaratory judgment action against the Sheriffs and District Attorneys of Cayuga and Seneca counties (hereinafter "DAs"). Because Tax Law § 471-e — the statute that creates a specialized tax exemption coupon system for the collection of taxes associated with the on-reservation retail sale of cigarettes — is not in effect, the Nation sought a declaration that it is under no obligation to collect and transmit to the Department sales taxes on the cigarettes it sells to consumers in its stores because they are located on "qualified reservation" property within the meaning of Tax Law § 470(16)(a). Contending that no laws were being violated, the Nation claimed that the law enforcement authorities lacked the power to obtain a search warrant or seize property and

demanded the return of the confiscated items. The Nation also sought an injunction barring the authorities from alleging that the Nation, or any of its employees, was violating the Tax Law by possessing or selling unstamped cigarettes on reservation land, asserting that such injunctive relief should remain in effect until a system for calculating and collecting the taxes stemming from on-reservation retail sales is properly put in place by the Department of Taxation and Finance.

The Nation moved for a preliminary injunction and the DAs cross-moved to dismiss the action arguing that the Nation could not evade the application of criminal laws by commencing a declaratory judgment action. In the alternative, the DAs asserted that their motion should be converted to an application for summary judgment because the facts were undisputed and the issue distilled to whether the convenience stores were located on a reservation and, if so, whether District Attorneys could enforce the existing criminal laws governing the collection of cigarette sales taxes in that context. During oral argument on the cross motions, the Nation agreed that the pending applications should be treated as requests for summary judgment.

Because no criminal action was pending against the Nation or any other individual associated with the operation of the convenience stores, Supreme Court concluded that the Nation could pursue its declaratory judgment action insofar as it challenged the scope and enforceability of the relevant cigarette tax statutes, but it could not contest the validity of the search warrant or

the propriety of its execution in a collateral civil action. It therefore dismissed the action to the extent it challenged the search warrant or sought return of the property that had been seized.[7] The court then rejected the Nation's remaining claims on the merits, concluding that Tax Law § 471 — the general statute that imposes a tax on cigarettes sold in New York — precluded any retailer, including an Indian Nation engaging in on-reservations sales to consumers, from possessing or selling unstamped cigarettes. The court reasoned that the DAs could use a criminal prosecution to enforce the general directive in Tax Law § 471, even though Tax Law § 471-e was not in effect. Supreme Court also concluded that the sales in question did not occur on a "qualified reservation" within the meaning of Tax Law § 470(16)(a), nor could the Nation exercise sovereign power over the property based on the analysis of the United States Supreme Court in *City of Sherrill, N.Y. v Oneida Indian Nation of New York* (544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 [2005]).

In the days following Supreme Court's decision, the DAs indicated that sealed indictments had been handed up by Grand Juries in Cayuga and Seneca Counties. But the individuals or entities named in those indictments have not been disclosed, nor has the criminal prosecution

7. It is not clear that the Nation appealed that part of Supreme Court's judgment to the Appellate Division, nor does the Nation argue in this Court that Supreme Court erred in dismissing the portions of its complaint challenging the execution of the search warrant. We therefore have no occasion to address that issue.

progressed, because the Nation appealed Supreme Court's order to the Appellate Division, which reversed the order insofar as appealed from and granted declaratory relief to the Nation.

The Appellate Division agreed with Supreme Court that the declaratory judgment action could proceed because no criminal charge was pending at the time the civil action was initiated. But it unanimously rejected Supreme Court's analysis of the qualified reservation issue, concluding that the Nation was entitled to a declaration that the convenience stores were situated on property that qualified as a reservation within the meaning of Tax Law § 470(16)(a). The Appellate Division split, however, regarding Supreme Court's interpretation of Tax Law § 471. The majority rejected the argument that the general statute provided an independent basis for enforcement action against the Nation or its employees, holding that a cigarette tax cannot be collected from an Indian nation (and, as a result, criminal penalties for non-compliance with the cigarette tax laws cannot be pursued) without a system in place that permits wholesale dealers and reservation sellers to lawfully distinguish between cigarettes destined to be sold to tax-exempt purchasers (members of the Cayuga Nation) and those earmarked for sale to other consumers. Given that sales by Indians to members of their tribe are tax-exempt under federal law, the majority viewed Tax Law § 471 as insufficient to establish the procedures for the lawful imposition and collection of such a tax. A single Justice dissented on the scope of Tax Law § 471, concluding that the provision

unreservedly imposes a tax on all cigarettes sold in New York, including on-reservation retail sales to non-Indians, and the absence of a specialized collection mechanism did not preclude prosecution of Indian retailers for failing to collect the taxes. The Appellate Division granted the DAs leave to appeal to this Court, certifying the question: "Was the order of this Court . . . properly made?"

III. *The propriety of the Declaratory Judgment Action*

We first address an important procedural issue. Relying on our decision in *Kelly's Rental v City of New York* (44 NY2d 700, 376 N.E.2d 915, 405 N.Y.S.2d 443 [1978]), the DAs assert that this declaratory judgment action — which was commenced the day after the search warrants were executed — should have been dismissed on the ground that it would interfere with a pending criminal prosecution. Both lower courts rejected this argument as do we.

The general rule is that, once a criminal action has been initiated, a criminal defendant may not bring a declaratory judgment action to raise a statutory interpretation or other issue that can be adjudicated in the criminal prosecution (*see generally Reed v Littleton*, 275 NY 150, 9 N.E.2d 814 [1937]; *New York Foreign Trade Zone Operators, Inc. v State Liq. Auth.*, 285 NY 272, 34 N.E.2d 316 [1941]; *see e.g. Kelly's Rental*,

supra).[8] The prohibition on declaratory judgment actions in this circumstance is comparable to the rule generally precluding a writ of prohibition by a criminal defendant — an adequate opportunity to raise legal arguments and receive appropriate relief will be available to the defendant in the criminal prosecution, particularly given a defendant's right to appeal adverse rulings in the event of a conviction.[9] Before a criminal action is commenced, however, a declaratory judgment action may be entertained in the discretion of the court if "the constitutionality or legality of a statute or regulation is in question and no question of fact is involved" (*Ulster Home Care v Vacco*, 255 AD2d 73, 77, 688 N.Y.S.2d 830 [3d Dept 1999]; *see New York Foreign Trade Zone Operators*, *supra*).

The DAs point out that, in *Kelly's Rental*, we stated that "[a] party against whom a criminal proceeding is

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8. This rule does not foreclose a party, based solely on their status as a criminal defendant, from raising issues in a declaratory judgment action that cannot be resolved in the criminal action and that, even if sustained, will not supply a basis to prevent the prosecution or collaterally attack the conviction (*cf. Hurrell-Harring v State of New York*, __ NY3d __, 2010 N.Y. LEXIS 635 [decided May 6, 2010]).

9. In contrast, because their right to appeal adverse rulings in criminal cases is severely circumscribed, the People can initiate a declaratory judgment action in certain limited circumstances to challenge an interlocutory ruling by a criminal court (*see Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 451 N.E.2d 150, 464 N.Y.S.2d 392, *cert denied* 464 U.S. 993, 104 S. Ct. 486, 78 L. Ed. 2d 682 [1983]).

pending may not seek declaratory relief" (44 NY2d at 702) and therefore referred to the commencement of a "criminal proceeding" as the point when a defendant is foreclosed from bringing such an action, rather than the commencement of a criminal action. As they correctly note, under the Criminal Procedure Law, the filing of a search warrant application commences a "criminal proceeding" (*see* CPL 1.20[18]; *see Matter of B.T. Prods. v Barr*, 54 A.D.2d 315, 319-20, 388 N.Y.S.2d 483 [1976], *affd* 44 NY2d 226, 376 N.E.2d 171, 405 N.Y.S.2d 9 [1978]) while a "criminal action" is not initiated until an accusatory instrument is filed against a defendant (*see* CPL 1.20[16]).

Our holding in *Kelly's Rental* falls neatly within the general rule. In that case, a private car rental company initiated an action seeking a declaration that a New York City Administrative Code provision imposing a licensing requirement did not apply to private car rental companies. Noting that the company and its employees had received "numerous summonses to appear in Criminal Court for alleged violations" of the provision, we concluded that "[a] party against whom a criminal proceeding is pending may not seek declaratory relief" (*Kelly's Rental*, 44 NY2d at 702). It was evident in that case that criminal prosecutions had been commenced against individual defendants, including the private car rental company, which barred the company's pursuit of declaratory relief in a collateral, civil action.

We did not cite the Criminal Procedure Law in *Kelly's Rental*, nor did we mean to invoke the definition

embodied therein when we used the phrase "criminal proceeding" informally instead of the more technically accurate "criminal action" to describe the procedural posture of the underlying prosecution. Our holding in *Kelly's Rental* did not expand the rule precluding the use of declaratory judgment actions to encompass situations like this one where a search warrant application was executed but no party was named as the defendant and no accusatory instrument had been filed against any person or company at the time civil relief was sought. A search warrant often targets a place without identifying a defendant. As such, it is not accurate to say that, in every case where a search warrant application has been filed, a criminal prosecution has been commenced, particularly since a warrant may be requested long before a decision is made to file criminal charges. A party is not categorically precluded from initiating a declaratory judgment action based on nothing more than the execution of a search warrant when the issue to be raised involves a pure question of law — such as a query concerning the scope and interpretation of a statute or a challenge to its constitutional validity — and the facts relevant to that issue are undisputed, as they are here. Because no criminal action had been initiated against any identified party at the time this declaratory judgment action was commenced, the decision whether the action could be entertained fell soundly within the realm of discretion possessed by the lower courts and we discern no abuse of that discretion in the denial of the motion to dismiss.

Appendix A

IV. *Whether the Nation's convenience stores are located on a "qualified reservation" under Tax Law § 470(16)(a)*

Although it is undisputed that the reacquired land on which the convenience stores are situated falls within the Cayuga aboriginal reservation, the DAs maintain that the property does not meet the definition of a "qualified reservation" under Tax Law § 470(16)(a). Hence, they contend that, even assuming that the general statutes criminalizing the possession and sale of unstamped cigarettes cannot be enforced against Indian retailers engaged in on-reservation sales as the Nation asserts, they can be enforced against the Nation and its employees because the convenience stores are not located on a reservation.

Whether the convenience stores sit on reservation land presents a critical threshold consideration. Federal law currently precludes a state from collecting cigarette sales taxes on sales by Indians to members of their own tribe or nation only if those sales occur on a reservation or other Indian lands (*see e.g. Moe*, *supra*, 425 U.S. 463). If the convenience stores are not on parcels entitled to recognition as reservation land, no federal exemption applies to any of the cigarette sales associated with that location, regardless of the status of the customers who purchase the cigarettes. And if all of the transactions are taxable, the lack of a specific calculation or collection methodology that distinguishes between sales to members of the tribe and sales to other consumers is irrelevant and cannot be asserted as a basis to avoid

compliance with the general cigarette sales tax statutes that govern the behavior of every other New York cigarette retailer.

The Nation contends that the two convenience stores stand on parcels that fall within the definition of a "qualified reservation" under Tax Law § 470(16), which provides:

> "16. 'Qualified Reservation.' (a) Lands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state; (b) Lands within the state over which an Indian nation or tribe exercises governmental power and that are either (i) held by the Indian nation or tribe subject to restrictions by the United States against alienation, or (ii) held in trust by the United States for the benefit of such Indian nation or tribe; (c) Lands held by the Shinnecock Tribe or the Poospatuck (Unkechauge) Nation within their respective reservations; or (d) Any land that falls within paragraph (a) or (b) of this subdivision, and which may be sold and replaced with other land in accordance with an Indian nation's or tribe's land claims settlement agreement with the state of New York. shall nevertheless be deemed to be subject to restriction by the United States against alienation."

This provision was added to the cigarette sales tax article at the same time that Tax Law § 471-e was amended in 2005 and was intended to define the terms used in that statute (*see* L 2005, ch 61, pt K). Despite the controversy over Tax Law § 471-e, neither party has argued that section 470(16) is not "in effect."

The Nation claims that the convenience store properties are covered by subsection (a) because they are "[l]ands held by an Indian nation or tribe" since the Nation possesses title and they are located within the Nation's aboriginal reservation, which has never been extinguished or disestablished by the Federal government — the only entity with the power to divest property of its reservation status. Thus, the Nation argues that the term "reservation" in subsection (a) refers to property recognized as such by the federal government.

The DAs counter that the term encompasses only reservations that had previously been recognized by the State Department of Taxation and Finance. Relying on the fact that, in a general tax exemption regulation promulgated pursuant to Tax Law § 1116 in 1982 (*see* 20 NYCRR 529.9), the Cayuga Nation was not included on a list of tribes with reservations in New York, they assert that the term "reservation" cannot be deemed to include property owned by the Nation.

We conclude that, when the Legislature used the term "reservation" in Tax Law § 470(16)(a), it intended to refer to any reservation recognized by the United

States government. Our analysis begins with the observation that subsections (a) and (b) of Tax Law § 470(16) appear to have been modeled after the definition of "Indian lands" in the federal Indian Gaming Regulatory Act (IGRA) (*see* 25 USC § 2703[4]). Under IGRA, "Indian lands" encompass "(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power" (*id.*) The Legislature's decision to borrow the language from this federal statute relating to Indian affairs strongly indicates its intention to include within the definition of a "qualified reservation" property that has been recognized as a reservation by the federal government.

The structure of Tax Law § 470(16) certainly supports this conclusion since subsections (c) and (d) — provisions that have no analogue in IGRA or any other federal statute — address uniquely state concerns. Rather than creating a general definition of reservation property, subsection (c) identifies two tribes by name, bringing within the definition of "qualified reservation" lands held by the Shinnecock Tribe or the Poospatuck (Unkechauge) Nation within their respective reservations. Because those tribes have been recognized by New York State but not the United States government, they have not attained the status of a

federally recognized reservation.[10] Subsection (d) similarly covers lands that have received special recognition from New York as that subsection includes property acquired as a result of the settlement of Indian land claims brought against the state.

Thus, if subsection (a) had been intended to refer only to reservations recognized by the New York government as the DAs claim, subsection (c) would have been unnecessary because the term "reservation" in subsection (a) would already embrace the New York tribes separately named in subsection (c). Clearly, subsection (a) was intended to refer to reservations recognized by the federal government while subsection (c) refers to reservations recognized only by New York State. It is evident from the language and structure of Tax Law § 470(16) that the Legislature used IGRA as a template for subsections (a) and (b) — the provisions referencing Indian lands recognized by the federal government — and then added two additional subsections to address reservation property that presented unique state concerns. Thus, the term

10. "Although the State of New York formally recognizes the Unkechauge Nation, the Tribe has no relationship with the federal government" (*City of New York v Golden Feather Smoke Shop, Inc.*, 2009 U.S. Dist. LEXIS 20953, 2009 WL 705815 [ED NY 2009]). The Shinnecock Tribe is also recognized by New York but has not yet succeeded in its long-standing efforts to obtain federal recognition, although formal recognition from the United States government may soon be forthcoming (*see* Hakim, *U.S. Eases Way to Recognition for Shinnecock*, New York Times, December 16, 2009).

"reservation" appearing in subsection (a) references reservation lands recognized by the federal government.

Viewed in this light, the "qualified reservation" question distills to whether the convenience store parcels are viewed as reservation property under federal law. This question cannot be answered without examination of the history of the Cayuga Indian Nation in New York. The Nation is one of the Six Nations of the Iroquois Confederacy that operated in Central New York before the United States was formed. Soon after the adoption of the federal constitution, Congress passed what has come to be known as the "Nonintercourse Act," arrogating to itself the exclusive power to regulate commerce with Indian tribes and nations that it had recognized. This Act barred the sale of tribal land without the explicit permission of the federal government.

In the 1794 Treaty of Canandaigua, the United States recognized that the Cayuga Indian Nation possessed an approximately 64,000 acre reservation in Central New York (prior to the ratification of the federal constitution, the New York government had similarly recognized this reservation). Despite the federal restriction on the alienability of Indian lands contained in the Nonintercourse Act, in 1795 and 1807, the State of New York entered into agreements with the Nation that resulted in the Nation surrendering fee title to all of its reservation lands. Some members of the Cayuga Nation then left New York while others took up residence on the Seneca Nation's New York reservation, where some descendants continue to reside.

Appendix A

Although the Nation no longer possessed fee title to any of its aboriginal reservation lands after 1807, under federal law, the absence of a fee interest is not determinative of the issue of reservation status. It is well settled that only Congress has the power to disestablish or diminish a reservation (*see City of Sherrill*, 544 U.S. at 215 n 9). "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise" (*Solem v Bartlett*, 465 US 463, 470, 104 S. Ct. 1161, 79 L. Ed. 2d 443 [1984]). Thus, the fact that the Nation entered into transactions transferring title to its aboriginal reservation property — including the convenience store parcels that were later reacquired — does not resolve the issue of whether the property in question retained its reservation status under federal law.

In various federal lawsuits, New York has claimed that the 1838 Treaty of Buffalo Creek disestablished some of the reservations that had been recognized in 1794, including the Cayuga reservation. But to date that argument has not been credited by the federal courts. As the Second Circuit noted in *Cayuga Indian Nation of N.Y. v Pataki*, "the Treaty of Buffalo Creek neither mentions Cayuga land or Cayuga title in New York, nor refers to the 1795 or 1807 treaties between New York and the Cayuga" (413 F3d 266, 269 n 2 [2d Cir 2005], *cert denied* 547 U.S. 1126, 126 S. Ct. 2021, 164 L. Ed. 2d 780 [2006]). It appears that every federal court that has examined whether the Cayuga reservation was

disestablished or diminished by Congress has answered that question in the negative (*see Cayuga Indian Nation of N.Y. v Village of Union Springs*, 317 F Supp 2d 128 [ND NY 2004] [1795 and 1807 transfers of land to NY violated Nonintercourse Act and were void ab initio and Congress did not disestablish or diminish Cayuga reservation in Treaty of Buffalo Creek], *action dismissed on other grounds* 390 F Supp 2d 203 [ND NY 2005]; *Cayuga Indian Nation of N.Y. v Cuomo*, 758 F Supp 107 [ND NY 1991] [lands reserved to Cayuga in 1794 Treaty of Canandaigua could only be divested by Congress] and 730 F. Supp. 2d 485 [ND NY 1990] [1795 and 1807 conveyances of land to New York were invalid under Nonintercourse Act and were not approved by Congress in the Treaty of Buffalo Creek], *action dismissed on other grounds sub nom Cayuga Indian Nation of N.Y. v Pataki*, *supra*, 413 F3d 266). Moreover, when the Nation purchased the convenience store properties in 2003, it applied to the United States government to have the parcels taken in trust on behalf of the tribe pursuant to 25 USC § 465. The United States Department of Interior, Bureau of Indian Affairs, has identified the land in question as within the limits of the Cayuga reservation; the fee-for-trust application remains pending and is being processed as a request pertaining to "on reservation" land.

To be sure, the Supreme Court has not yet determined whether parcels of aboriginal lands that were later reacquired by the Nation constitute reservation property in accordance with federal law. Its answer to that question would settle the issue. But based

on existing precedent and federal consideration of the fee-for-trust application, the United States government continues to recognize the existence of a Cayuga reservation in New York, as noted in the amicus brief submitted by the United States in support of the Nation's position. In the absence of contrary federal authority, we necessarily must conclude that the convenience store properties in this case meet the definition of a "qualified reservation" under Tax Law § 470(16)(a).

The DAs' reliance on the United States Supreme Court's decision in *City of Sherrill, N.Y. v Oneida Indian Nation of N.Y.* (*supra*, 544 U.S. 197) to the contrary is misplaced. In *City of Sherrill*, the Supreme Court applied the doctrines of laches, acquiescence and impossibility to bar a claim by the Oneida Indian Nation that its repurchase of aboriginal reservation lands resulted in the reassertion of that tribe's sovereign authority relieving the tribe of the obligation to pay real property taxes on the reacquired parcels. Emphasizing the disruptive nature of the real property tax exemption claim, the Court noted that "parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor the historic wisdom in the value of repose" and lead to "[a] checkerboard of alternating state and tribal jurisdiction in New York State — created unilaterally at [the Oneida Nation's] behest" (*id.* at 219-220 [internal quotation marks omitted]). It concluded that this would "seriously burden the administration of state and local governments and would adversely affect landowners neighboring the tribal

patches" (*id.* at 220 [internal quotation marks and brackets omitted]).

Because the Oneida history in New York is similar to that of the Cayuga Nation, the DAs argue that the rejection of the Oneida real property tax exemption claim in *City of Sherrill* compels us to reject the Nation's argument in this case that the land it reacquired constitutes "qualified reservation" land within the meaning of Tax Law § 470(16)(a). They point out that, in the wake of *City of Sherrill*, claims by the Nation seeking possession of land sold to New York in the early 1800s have been dismissed by the federal courts under the doctrines of laches, acquiescence and impossibility (*see Cayuga Indian Nation of N.Y. v Pataki*, *supra*, 413 F3d 266). And a claim by the Cayuga that they were exempt from zoning and land use laws on reacquired property in the tribe's aboriginal reservation have similarly been dismissed based on the *City of Sherrill* analysis, under the rationale that avoidance of zoning and land use laws would be just as disruptive as avoidance of real property taxes (*see Cayuga Indian Nation of N.Y. v Village of Union Springs*, 390 F Supp 2d 203 [ND NY 2005]).

In *City of Sherrill* and its progeny, Indian nations and tribes relied on the doctrine of sovereign authority, claiming that their reacquisition of aboriginal reservation lands automatically and unilaterally allowed them to claim immunity from state real property tax and zoning laws. As the Supreme Court explained, the tribe asserted that reacquisition of the land allowed it to

"rekind[le] embers of sovereignty that long ago grew cold" (*City of Sherrill*, 544 U.S. at 214). This is the argument that was rejected in *City of Sherrill* and the subsequent precedent.

In this case, however, the Nation does not suggest that its reacquisition of the convenience store parcels revives its ability to exert full sovereign authority over the property. Rather than seeking immunity from state tax laws, it is actually relying on state tax laws; the Nation contends that, under the plain language of Tax Law § 470(16)(a), the property it reacquired constitutes "qualified reservation" property.

City of Sherrill dealt with whether a tribe could exercise sovereign power over reacquired land for purposes of avoiding real property taxes — not whether reacquired land is ascribed reservation status under federal law. As to the latter, the lower courts in *City of Sherrill* had held that aboriginal reservation property sold by the Oneida Nation in the early 1800s that had been recently reacquired constituted "Indian country" under 18 USC § 1151(a), defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." They rejected the assertion by the municipal defendants in that case that the Oneida reservation had been lawfully disestablished by the federal government in the 1838 Treaty of Buffalo Creek. The Supreme Court reaffirmed the principle that "only Congress can divest a reservation of its land and diminish its boundaries" (*id.* at 215 n 9 [internal quotation marks omitted]) and did not disturb the

holding that the reacquired property constituted Indian country, noting that it did not need to decide whether the Treaty of Buffalo Creek disestablished the Oneida reservation (*City of Sherrill*, 544 US at 215 n 9; *see also id.* at 223 [Stevens dissent] [noting that the majority accepted the conclusion of the lower courts that the Oneida reservation had never been disestablished or diminished by Congress and that "all of the land owned by the Tribe within the boundaries of its reservation qualifies as Indian country"]). In other words, even assuming that the reservation was not disestablished and that the reacquired land was reservation property as the District Court and Second Circuit had held, the doctrines of laches, acquiescence and impossibility still precluded reassertion by the tribe of sovereign authority over the property for purposes of real property taxation. In decisions post-dating *City of Sherrill*, federal courts have continued to hold that the parcels reacquired by the Oneida possess reservation status for various purposes, despite the Oneida's inability to exercise full sovereign authority over those lands (*see e.g. Oneida Indian Nation of New York v Madison County*, 401 F Supp 2d 219 [ND NY 2005], *affd* F3d , n 6 [2d Cir 2010] [Second Circuit noted that its prior holding in *City of Sherrill* concluding that the Oneida reservation was never disestablished was not disturbed by the Supreme Court and "therefore remains the controlling law of this circuit"]). Although *City of Sherrill* certainly would preclude the Cayuga Nation from attempting to assert sovereign power over their convenience store properties for the purpose of avoiding

real property taxes,[11] the decision simply does not establish that the convenience stores are not located on a reservation recognized by the United States government.

The DAs argue that realty cannot be ascribed reservation status if the Indian nation cannot fully exercise sovereign power over it. But *City of Sherrill* suggests exactly the opposite. The Supreme Court expressly declined to reach the issue of whether the Second Circuit erred in concluding that the Oneida reservation had not been disestablished; the Court assumed that the property reacquired by the tribe was reservation property but nonetheless held that the Oneida Nation could not unilaterally exert sovereign authority over it for purposes of avoiding real property taxes.

And Tax Law § 470(16) itself makes a distinction between reservation property and property over which an Indian nation or tribe has sovereign authority. Subsection (a) on which the Cayuga Nation relies refers to land held by an Indian nation within the "reservation" of that nation, without any reference to the tribe's ability to exercise sovereign power over that land. In contrast, sovereign authority is addressed in subsection (b), which defines "qualified reservation" as including "[l]ands within the state *over which an Indian nation*

11. The Cayuga Indian Nation acknowledges its obligation to pay real property taxes and comply with local zoning and land use laws on these parcels and it is undisputed that the Nation has, to date, fulfilled those obligations.

or tribe exercises governmental power . . ." (Tax Law § 470[16][b] [emphasis added]). Thus, the Tax Law distinguishes between one type of "qualified reservation" land over which a tribe exercises governmental power (subsection b) and another which has been ascribed "reservation" status under federal law (subsection a). This is consistent with the federal statutes authorizing the United States to hold property in trust for an Indian tribe, a process that results in the tribe being able to exercise some measure of sovereign authority over recently acquired lands, whether they were or were not a part of its aboriginal reservation. If property is not a reservation unless the tribe can exercise governmental authority over it as the DAs maintain, then it would have been unnecessary to include subsection (a) since all reservation property would fall within subsection (b)'s "governmental power" provision.

Our conclusion that the Nation's convenience store properties meet the definition of "qualified reservation" in Tax Law § 470(16)(a) is also consistent with the legislative history of that provision. As the DAs correctly point out, the Supreme Court issued its decision in *City of Sherrill* before Tax Law § 470(16)(a) was approved. Thus, the fact that the Supreme Court had recognized that an Indian nation might possess reservation property over which it could not exercise aspects of its traditional sovereign power would have been known to the Legislature at the time the statute was enacted. Yet the Legislature nevertheless adopted a statute that distinguishes between reservation land and property over which Indian nations exercise

governmental power — and crafted a definition of "qualified reservation" that encompassed both.

In addition, it is notable that the Legislature chose to include in Tax Law § 470(16)(a) a general definition of qualified reservation that does not reference specific tribes. This was a departure from the approach that had been taken by the Department in a 1982 general tax exemption regulation, which contained a list of tribes with recognized Indian reservations that did not include the Cayuga Indian Nation (*see* 20 NYCRR 529.9 [a][2])[12]. Although the DAs suggest that this omission is evidence that the Department does not recognize reacquired property as having reservation status,[13] we do not find the omission to bear that significance given that, at the

12. Since 1976, however, the Nation has been listed as a tax exempt organization in Tax Law § 1116(a)(6), the regulation's enabling statute.

13. Based on the regulations proposed in February 2010, it appears that the Department of Taxation and Finance now recognizes that properties reacquired by the Nation in the past decade can have reservation status as the regulations include the Cayuga Indian Nation among the list of tribes for whom "the probable demand of the qualified Indians on the nation's or tribe's qualified reservation" must be calculated and makes a preliminary calculation of the Nation's probable demand (20,100 packs of cigarettes per quarter) (*see* proposed 20 NYCRR 74.6[f][2], [f][2][i]). Since the Nation owned no property in New York prior to 2003, the inclusion of the Nation in this regulation can only be interpreted as an acknowledgment that recently acquired property can meet the definition of "qualified reservation" in Tax Law § 470(16), as we have concluded.

time the regulation was promulgated, the Nation did not possess fee title to any property in this state, having not yet reacquired any parcel of its aboriginal reservation.[14]

The DAs further rely on the definition of "qualified Indian" in Tax Law § 470(15) in support of their argument that the convenience stores are not located on a "qualified reservation." This term, intended to identify Indians who can purchase cigarettes tax free under the collection mechanism in Tax Law § 471-e, defines "qualified Indian" to include: "A person duly enrolled on the tribal rolls of one of the Indian nations or tribes. In the case of the Cayuga Indian Nation of New York, such term shall include enrolled members of such nation when such enrolled members purchase cigarettes on any Seneca reservation" (Tax Law § 470[15]). In their view, this provision represents an

14. The Legislature appears to have made a considered decision, when adopting the definition of "qualified reservation" for purposes of the 2005 legislation, not to follow the approach previously taken by the Department in the 1982 regulation; rather than listing all the tribes that had reservations in New York, it enacted a general definition that borrowed language from IGRA, a federal statute, to identify the properties that would constitute a "qualified reservation" for purposes of the collection of cigarette sales taxes emanating from sales by Indian retailers. For this reason, we reject the DAs' argument that the Cayuga Indian Nation cannot be viewed as having a reservation under Tax Law § 470(16) under the definition adopted by the Legislature because a 1982 regulation drafted by the Department at a time when the Nation owned no property in New York did not recognize such a reservation.

explicit recognition by the Legislature that the Cayuga have no reservation land of their own and therefore negates the argument that the reacquired parcels can constitute Cayuga reservation land under Tax Law § 470(16)(a). We are unpersuaded.

Tax Law § 470(15) accounts for the fact that, until 2003, the Cayuga Nation did not own any land in New York and many of the Cayuga live on the Seneca reservation. Thus, the statute is a narrow accommodation to those Cayuga members that allows them to buy cigarettes tax free on the reservation where they reside, even though the general rule is that Indians may purchase tax free items only on the reservation of their own nation or tribe. Since Tax Law § 470(15) neither defines nor addresses the term "reservation," it does not support the DAs' argument that the term does not embrace land that is recognized as such by the United States government.[15]

15. The argument that reservation status is negated by Tax Law § 470(15) is further undermined by section 470(14), also adopted in the 2005 legislation. Section 470(14) includes the Cayuga Indian Nation within the definition of an "Indian nation or tribe." Since that definition, along with the others we have discussed, was intended to facilitate enforcement of Tax Law § 471-e — a statute that exclusively addresses the collection of sales taxes for retail cigarette purchases occurring on "qualified reservations" — the inclusion of the Cayuga Indian Nation among the tribes impacted by the 2005 legislation further supports our conclusion that the Legislature did not intend to exclude property owned by the Nation from the definition of "qualified reservation" adopted in Tax Law § 470(16)(a).

Appendix A

In response to the argument that our interpretation of Tax Law § 470(16)(a) will impact the meaning of the term "reservation" in other statutes, such as Indian Law § 6 or Real Property Tax Law § 454, we emphasize that — as is usually the case when we construe the language in a statute — our analysis applies only to the statute we are currently charged with interpreting. As explained above, Tax Law § 470(16) was, in part, patterned after a federal statute and was adopted after the Supreme Court decided *City of Sherrill*, at a time when the Legislature was aware that reservation status and sovereign authority are not necessarily coextensive. And our interpretation of the term "reservation" in this case turns not only on the wording but on the structure of the statute — e.g., the inclusion of subsection (b) distinctly addressing an Indian nation's exercise of "governmental power" over a parcel — and the other historical and contextual factors we have discussed. The statutes cited by the DAs appear in other chapters of the consolidated laws, were adopted at different times and have their own distinct structures and legislative histories. We express no view on the meaning of provisions that are not before us for review, other than to note that terms found in Tax Law § 470(16)(a) will not necessarily be accorded the same meaning when they appear in other statutory contexts.[16]

16. The dissent does not offer an alternate interpretation of Tax Law § 470(16) but instead asserts that the statute is without "legal significance" because it defines terms found in Tax Law § 471-e, a statute that is not in effect (dissenting op at 3). The DAs did not propose this view of the statute. They argued

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Appendix A

V. *Reliance on Tax Law § 471 to enforce sales tax collection obligations against Indian retailers*

The DAs do not dispute that, if the convenience store properties are located on a "qualified reservation," Nation retailers may sell untaxed cigarettes to members of the Nation on those properties. But they contend that, even assuming the properties have "qualified reservation" status under New York law, Tax Law § 471 imposes a sales tax on cigarettes sold by Indian retailers to non-Indians and this can be enforced against the Nation, notwithstanding the fact that the tax exemption coupon system devised by the Legislature in Tax Law § 471-e is not in effect.

The Nation responds that, regardless of whether Tax Law § 471 "imposes" a tax, there is currently no mechanism in New York law for determining how much sales tax is due in relation to retail sales that occur on an Indian reservation, how much non-taxed inventory can be maintained and what process will be used for collecting the taxes due from Indian retailers, while simultaneously respecting their federally protected

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that the term "qualified reservation" had an established meaning under state law based on Department regulations and publications issued before the statute was adopted, contending that the Department had excluded the Nation from the list of tribes with reservation property in New York. They further relied on Tax Law § 470(15) — a subsection enacted in the same legislation that also defines terms used in Tax Law § 471-e.

right to make tax-free sales to tribal members. Since Tax Law § 471-e, which was designed for this purpose, is not enforceable and the Department has not formally adopted regulations or otherwise implemented such a system, the Nation maintains that Indian retailers cannot be criminally prosecuted for non-compliance with the laws governing sales taxes. We agree with the Nation.

There is no question that Tax Law § 471 generally imposes a sales tax on cigarettes sold in New York. The statute declares: "There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax . . ." (Tax Law § 471[1]). The statute further discloses the amount of the tax, currently $2.75 per 20-cigarette pack. The issue here is not whether Tax Law § 471(1) "imposes" a sales tax — or, as the dissent might frame it, whether the state has the power to tax cigarette sales to non-Indians. Rather, the question is how the tax is to be assessed and collected in the unique retail context presented here and from whom.

The ultimate obligation to pay cigarette sales taxes rests on the consumer, although in most cases that duty is fulfilled, consistent with the tax stamping scheme, by payment of the tax to the retailer, who passes it up to the distributor and wholesaler, who remits it to the Department through the purchase of tax stamps. If, for any reason, a sales tax that is properly owed is not collected in this manner, the consumer remains under

the obligation to remit it through other means (*see* Tax Law § 471; Tax Law § 471-a [imposing a "use tax" on cigarettes used in New York for which sales taxes were not paid]).[17]

Thus, the issue in this case is not whether sales taxes are due when non-Indian consumers purchase cigarettes from Indian retailers — they are. The issue is whether Indian retailers can be criminally prosecuted for failing to collect the sales taxes from consumers and forward them to the Department. In the absence of a methodology developed by the State that respects the federally protected right to sell untaxed cigarettes to members of the Nation while at the same time providing for the calculation and collection of the tax relating to retail sales to non-Indian consumers, we answer this question in the negative.

17. In fact, Tax Law § 1112(c) specifically addresses the payment by consumers of taxes emanating from goods purchased on Indian reservations: "Where property or services subject to sales or compensating use tax have been purchased on or from a qualified Indian reservation . . . , the purchaser shall not be relieved of his or her liability to pay the tax due. Such tax due and not collected shall be paid by the purchaser directly to the department." The statute not only declares that the tax is owed but directs how it may be paid, stating that consumers can account for the taxes on their personal income tax forms. Like Tax Law § 470(16), Tax Law § 1112 was amended in the 2005 legislation amending Tax Law § 471-e. But no claim has been made that the statute is not "in effect," nor — unlike section 471-e — would it have been necessary for the Department to take any actions prior to implementation of its provisions.

Appendix A

We begin with the observation that the Legislature itself concluded that a system — either in statutory or regulatory form — must be adopted before Indian retailers are required to act as intermediaries for the collection of State cigarette sales taxes.[18] This is not surprising since, in our decision in *Matter of New York Assn. of Convenience Stores*, we noted that the 1988 regulations — which had been repealed — "provided the only regulatory framework for enforcing the . . . cigarette taxes on Indian reservations" (92 NY2d at 214). In the absence of another collection mechanism tailored to on-reservation retail sales, the repeal of the regulations "signified that the Tax Department [had] committed itself to withholding acting enforcement on a long-term basis" (*id.*). Quoting from the Department's explanation for the repeal, we clarified that "the repeal . . . does not eliminate the statutory liability for taxes as they relate to sales on Indian reservations to nonexempt individuals" (*id.*) — a point that we reaffirm today. Although non-Indian consumers remained obligated to pay the taxes, the 1998 repeal of the regulations resulted in the annulment of an authorized method for calculating and collecting that tax from Indian retailers.

18. Likewise, after the Supreme Court decided *Moe* in 1976 announcing that it was permissible for states to collect sales taxes relating to purchases by non-Indian consumers on reservations, the Department did not immediately attempt enforcement efforts based on Tax Law § 471. Rather, it adopted regulations in 1988 tailored to specifically address the calculation and collection issues presented by such sales.

This was the void the Legislature intended to fill in 2003 when it passed the initial version of Tax Law § 471-e directing the Department to promulgate whatever "rules and regulations necessary to implement the collection of sales and use taxes on . . . cigarettes or other tobacco products" purchased by non-Indian consumers on reservation property (former Tax Law § 471-e; L 2003, ch 62, T3, § 4, as amended by 2003, ch 63, pt Z, § 4). When the Department failed to do so, the Legislature amended Tax Law § 471-e to incorporate a tax exemption coupon system for the calculation and collection of sales taxes. The Legislature attempted to accomplish the same result in 2004 but the bill amending Tax Law § 471-e was vetoed by the Governor. Although the bill jacket for the 2005 legislation does not contain a sponsor's memorandum, the sponsor's memorandum for the 2004 legislation emphasized that the purpose of the amendment was to "provide[] for the taxation of cigarettes . . . on qualified Indian reservations when sold to non-Indians" (Sponsor's mem, Veto Jacket, 2004 NY Senate Bill S6822-B, at 8). Since the Department failed to heed the direction in the 2003 legislation "to put a system in place to collect non-Indian taxes," the Legislature acted in 2005 by incorporating the Department's draft regulations into the statute. The sponsor further explained that the Legislature understood and intended to respect Native American sovereignty and to "assure that Native Americans who purchase cigarettes . . . on reservations continue their tax exempt status" (*id.* at 8-9). To that end, the system had been designed so that the state could "collect these taxes at the distributor level before [the cigarettes] are

transported onto the reservation" subject to a subsequent tax rebate that accounted for the right of Indians to make tax-free purchases (*id.*).

Based on the 2003 and 2005 legislation, it is clear that the Legislature did not view Tax Law § 471 as a sufficient regulatory or statutory predicate for the collection of sales taxes from Indian retailers. Nor would a system of ad hoc enforcement by local District Attorneys, without implementation of an appropriate calculation and collection methodology, be consistent with legislative intent. The Legislature acknowledged that Indian nations and tribes, and their members, enjoy a federal tax exemption. It expressed a sensitivity to the enforcement issues presented in the context of on-reservation sales, even emphasizing that its system allowed the state to collect taxes "at the distributor level," rather than pursuing enforcement directly from Indian retailers. It is hard to imagine an approach more inconsistent with the tack taken by the Legislature than a system that depends on criminal prosecutions of individual Indian retailers or their employees as the primary enforcement mechanism.

Moreover, in *Milhelm*, the United States Supreme Court analyzed the tax collection scheme that had been implemented in some detail to assess whether it was "unduly burdensome" (512 U.S. at 76).[19] It discussed the

19. The dissent suggests that *Milhelm* was decided based on principles of Indian sovereignty (dissent op at 4). But this is not the case. In *Milhelm*, non-Indian wholesalers challenged

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"probable demand" approach embodied in the 1988 New York regulations, noting that the system was permissible on its face, while cautioning that it could be subject to challenge if the Department's calculation of "probable demand" was inadequate and failed to account for legitimate tax-exempt sales. And it specifically approved one feature of the 1988 regulations — that the state was not permitted to precollect taxes on cigarettes that were ultimately the subject of tax-exempt sales. The careful analysis undertaken by the Supreme Court in *Milhelm* would have been unnecessary if no specialized mechanism is needed to apply a general tax stamping scheme to sales by Indian retailers.

To decide otherwise is to create a system of ad hoc enforcement of cigarette sales tax laws by county prosecutors. In the absence of an overarching methodology devised by the Legislature or the Department for adapting the tax scheme to the unique context of qualified reservation sales, a District Attorney would be in a position to decide — after the fact — what actions the Indian retailer should or could have taken to comply with the statute. Indeed, in the context of this case, the DAs have changed their position regarding what an Indian retailer might do to avoid criminal prosecution for non-compliance with Tax Law

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the 1988 regulations as preempted by federal Indian trader statutes. The Court made clear that its decision did not address other concerns, such as how New York's scheme "might affect tribal self-government or federal authority over Indian affairs" (*Milhelm*, 512 U.S. at 69).

§ 471's general requirements. Initially, they proposed that the entire inventory of cigarettes held by Indian retailers would need to display tax stamps (a position consistent with Tax Law § 471, which precludes the possession of unstamped cigarettes), suggesting that a retailer might be able to seek refunds from the Department for tax-exempt sales made to tribal members. Yet, the DAs did not explain how the Department was to assess the validity of refund claims based on sales that had already occurred, absent a tax exemption coupon system or some other Department-sanctioned tracking method.

Later, the DAs contended that Indian retailers might be able to maintain an inventory of untaxed cigarettes to sell to tribe members. In their brief in this Court they state that "an Indian group or tribe can readily comply with the Tax Law by selling its allotment of unstamped cigarettes to its own members by using their existing identification card" (Def Br, at 38). Of course, the crux of the problem is that there is no way for Indian retailers (or anyone else) to know what the state-sanctioned inventory "allotment" is (or how to acquire it) — and, therefore, how many unstamped cigarettes a retailer may lawfully possess — absent a method such as the "probable demand" system for making that determination. In this milieu of uncertainty, the Indian retailers would bear the burden of proving that their inventory of untaxed cigarettes was necessary to serve the needs of Indian purchasers. It appears that retailers would be allowed to raise this as an affirmative defense — to be offered at the election of a District

Attorney since no such defense appears in Tax Law § 471 (or anywhere else in the Tax or Penal Laws). Under this proposed methodology, in order to make tax-free sales to tribal members as permitted by federal law, Indian retailers would have to run the risk — and bear the costs (both monetary and otherwise) — of criminal prosecution in the hope that a jury would ultimately credit their view of the evidence.

Not only are these approaches impractical, but we doubt that they would comply with the United States Supreme Court's requirement that a sales tax collection scheme involving Indian Retailers be not "unduly burdensome." Even outside the context of Indian relations, taxpayers are not ordinarily required to guess what they need to do to comply with the tax law. It is generally up to the Legislature and the Department to articulate — before a transaction occurs — in what circumstances a tax is owed, who is obligated to collect it, how it should be calculated and when and how it must be paid. Whatever methodology is ultimately used to calculate and collect sales taxes derived from on-reservation retail sales of cigarettes, we would expect that advance notice would be supplied to Indian retailers and that the system would be uniform throughout the state. The approaches suggested here do not meet these minimal requirements.

The DAs' reliance on *Snyder v Wetzler* (84 N.Y.2d 941, 644 N.E.2d 1369, 620 N.Y.S.2d 813 [1994], *affg* 193 AD2d 329, 603 N.Y.S.2d 910 [3d Dept 1993]) for the proposition that, standing alone, Tax Law § 471 provides

an adequate method for the calculation and collection of sales taxes from Indian retailers is misplaced. In 1993, at a time when the 1988 regulations had not yet been repealed (although they had been stayed as a result of the ongoing *Milhelm* litigation), a member of the Seneca Nation initiated an action seeking a general declaration "that the State was without power to impose or collect taxes on [cigarette] sales made within the Indian reservation" (193 AD2d at 330). This Court rejected that argument, noting that the "United States Supreme Court has clearly established that State tax statutes requiring Indian retailers to collect and remit taxes on sales to non-Indian purchasers, and to keep the records necessary to ensure compliance, violate neither the Commerce Clause nor the constitutional proscription against direct taxation of Indians absent explicit congressional consent" (84 NY2d at 942).

Contrary to the DAs' suggestion, Tax Law § 471 was not discussed in the *Snyder* decision nor, in any event, could the same issues relating to its enforcement have been resolved since, at that time, the Department had formally promulgated and was actively seeking to enforce regulations addressing the complicated calculation and collection issues arising from on-reservation sales. *Snyder* does nothing more than reaffirm the general principle articulated in *Moe* (which was subsequently reaffirmed in *Milhelm*) that states can collect sales taxes for goods sold to non-Indians on reservation properties if they devise and implement an appropriate mechanism for doing so.

The federal decisions on which the DAs depend are also inapposite as most do not involve on-reservation retail sales of cigarettes to consumers for their personal use but arose from large-scale cigarette bootlegging activities engaged in by Indian and non-Indian traders. For example, *United States v Kaid* (241 Fed Appx 747 [2d Cir 2007]) is a criminal case against a defendant charged with violating the federal crime of trafficking in contraband cigarettes. The defendant claimed that, since New York does not enforce its laws imposing taxes on retail sales to non-Indians on reservations, the cigarettes he possessed and resold were not contraband within the meaning of the federal statute. The Second Circuit disagreed, noting:

> "While it appears that New York does not enforce its taxes on small quantities of cigarettes purchased on reservations for personal use by non-native Americans, nothing in the record supports the conclusion that the state does not demand that taxes be paid when, as in this case, massive quantities of cigarettes were purchased by non-Native Americans for resale" (*id.* at 750).

As is evident from *Kaid*, the complex calculation and collection issues raised when a state attempts to collect sales taxes from Indian retailers (such as determining which cigarettes possessed for potential sale must contain tax stamps and which need not, and which sales are exempt from taxation because they involve Indian consumers and which are not) are not present when a

wholesaler or distributer, whether Indian or otherwise, makes a bulk sale of cigarettes to a party that intends to resell them off the reservation. The federal tax exemption applies only to on-reservation sales to Indians for their personal use — there is no exemption allowing Indians to engage in the wholesale distribution of untaxed cigarettes destined for off-reservation sales. Thus, the exemption is not implicated when conduct of the type at issue in *Kaid* is alleged and no special calculation or collection mechanism like the system set forth in Tax Law § 471-e is necessary because not a single pack of cigarettes involved in such a transfer would be tax exempt. Thus *Kaid* and the other federal cigarette bootlegging cases cited by the DAs (*see e.g. City of New York v Golden Feather Smoke Shop* (2009 U.S. Dist. LEXIS 76306, 2009 WL 2612345 [ED NY 2009], certifying question to NY Ct of App 597 F3d 115 [2d Cir, March 4, 2010]; *United States v Morrison*, 596 F Supp 2d 661 [ED NY 2009]) are distinguishable as they do not raise the same issues concerning collection of sales taxes from Indian retailers based on sales to individual consumers as presented in this case.

In sum, although Tax Law § 471 certainly "imposes" a cigarette sales tax, we conclude that the Cayuga Nation is entitled to a declaration that the absence of an appropriate legislative or regulatory scheme governing the calculation and collection of cigarette sales taxes that distinguishes between federally-exempt retail sales to Indians occurring on a "qualified reservation" and non-exempt sales to other consumers precludes reliance on Tax Law § 471 as the sole basis to sanction Nation retailers for alleged non-compliance with the New York Tax Law.

Contrary to the dissent's suggestion otherwise, we are not relying on Tax Law § 471-e as the basis for this conclusion. We have assumed, for purposes of this appeal, that section 471-e is not in effect — if that statute was enforceable, there would be a statutory method for calculating and collecting the taxes generated by the Nation's retail sales at its convenience stores. Nor do we claim that section 471-e has created a tax exemption. The restrictions that limit the state's efforts to collect cigarette taxes from Indian nations or their members in this context are derived from federal law and this prompted the Legislature to address the need for a specialized tax collection scheme by adopting Tax Law § 471-e. Since section 471-e was never operative, and no other comparable statutory or regulatory scheme has filled that gap, the Nation is entitled to declaratory relief.

Accordingly, the order of the Appellate Division should be modified by granting judgment declaring in accordance with this opinion and, as so modified, affirmed, with costs to the plaintiff. The certified question should be answered in the negative.

PIGOTT, J.(dissenting):

In my view, the State has validly imposed both a tax obligation on the cigarettes sold by the Cayuga Nation to the public and a mechanism by which those taxes are to be collected under Tax Law § 471. Because the Nation has admittedly refused to fulfill its collection and remittance obligations under the statute, the sale of unstamped cigarettes from the Nation's two convenience stores is properly a subject for criminal prosecution. Accordingly, I respectfully dissent.

New York's Tax Law § 471 imposes a cigarette excise tax. That provision applies to all cigarettes possessed in the State for sale, except that "no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax" (§ 471 [1]). Tax Law § 471 (2) sets forth the mechanism for the collection of the taxes imposed by the State on the cigarette sales. Specifically, a State licensed stamping agent is required to advance the amount of the tax by purchasing stamps from the State and affixing them to each package of cigarettes. The stamp cost is built into the cost of the cigarettes and is passed along to the consumer (§ 471 [2]). The penalty for a violation of the taxing statute is found in Tax Law § 1814, which provides that any person who "willfully attempts in any manner to evade or defeat the taxes imposed [on cigarette sales] . . . shall be guilty of a class E felony." Thus, pursuant to this section of New York's Tax Law, all cigarettes that the State has the power to tax are required by law to be stamped.

Appendix A

It is undisputed that the State has the power to tax a majority of the Nation's cigarette sales — those cigarettes sold to non-Indians (*see Dept of Taxation and Finance v Wilhelm Attea U & Bros. Inc*, 512 U.S. 61, 64, 114 S. Ct. 2028, 129 L. Ed. 2d 52 [1994] [explaining that "[o]n-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state taxation"). The Nation contends, however, that the State does not have the power to tax *any* of its cigarette sales because the Tax Department has not implemented the coupon system adopted in section 471-e of the Tax Law.

Section 471-e requires (as does section 471) that all cigarettes sold on an Indian reservation to non-Indians be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp (§ 471-e [1] [a]). The provision also includes a tax exemption: "qualified Indians may purchase cigarettes for such qualified Indians' own use or consumption exempt from cigarette tax on their nations' or tribes' qualified reservations" (*id.*). It is acknowledged, however, that section 471-e of the Tax Law is not in effect.[1] Therefore, contrary to the

1. The Legislature provided that the amended version of Tax Law § 471-e "shall take effect March 1, 2006, provided that any actions, rules and regulations necessary to implement the provisions of [the statute] on its effective date are authorized and directed to be completed on or before such date." In *Day Wholesale, Inc. v State of New York* (51 AD3d 383, 856 N.Y.S.2d 808 [4th Dept 2008]), the Appellate Division concluded that the amended version of Tax Law § 471-e was not "in effect" based

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belief of my colleagues in the majority, it provides no basis for immunity from New York's cigarette tax laws.

The majority further argues that the Nation can rely on the plain language of Tax Law § 470 (16) as a basis for its statutory exemption. That provision, however, is under the definition section of the Tax Law, and defines the term "qualified reservation": a term used only in section 471-e, which the parties concede is not in effect. Thus, section 470 (16) merely defines a term whose meaning, unless and until section 471-e becomes effective, has no legal significance.

Without section 471-e's statutory tax exemption in effect, the Nation may not foreclose the State from imposing and collecting taxes on cigarettes sold at the stores. Although the Nation cites to a number of cases which have held that a State cannot tax on-reservation cigarette sales to members of the reservation's governing tribe for their own use, those cases were decided under the principles of Indian sovereignty (*see e.g. Dept. of Taxation and Finance v Wilhelm Attea & Bros. Inc*, 512 U.S. 61, 64, 114 S. Ct. 2028, 129 L. Ed. 2d 52 [1994]; *Moe v Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 [1983]), and in the wake of the

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on the failure of the Department of Taxation and Finance to take action to implement that statute by issuing necessary coupons. Because the parties do not challenge that holding on this appeal, I assume, for purposes of this appeal, the correctness of the decision.

United States Supreme Court's decision in *City of Sherrill*, are irrelevant to any claim by the Nation. In *City of Sherrill v Oneida Indian Nation of NY* (544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 [2005]), the Supreme Court concluded that an Indian Nation cannot unilaterally revive its ancient sovereignty, in whole or in part, over later-required parcels (*City of Sherrill*, 544 U.S. at 214). Thus, as even the majority recognizes, the Nation may not assert sovereign authority over their store properties for the purpose of avoiding taxes (*see e.g.* majority opn. at 34).

Even assuming that the statutory immunity provided for under section 471-e was in effect and was applicable to the Nation, the statute by its very language still requires that all cigarettes sold on an Indian reservation to non-Indians be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp (§ 471-e [1] [a]). Although section 471-e would alter the collection mechanism imposed on the Nation for cigarettes sold to its Indian members, it would in no way alter the tax obligation of the Nation for cigarettes sold to non-Indians (*see New York Ass'n of Convenience Stores v Urbach*, 92 NY2d 204, 699 N.E.2d 904, 677 N.Y.S.2d 280 [1998]) ("the repeal [of the regulations effecting section 471-e] does not eliminate the statutory liability for taxes as they relate to sales on Indian reservations to nonexempt individuals").

Simply put, the lack of implementing regulations under section 471-e, a statutory provision that is not in effect, does not affect the tax obligation of the Cayuga

Nation to sell only tax stamped cigarettes. Consequently, I would vote to reverse the order of the Appellate Division and answer the certified question in the negative.

* * * *

Order modified, with costs to plaintiff, by granting judgment declaring in accordance with the opinion herein and, as so modified, affirmed. Certified question answered in the negative.

Opinion by Judge Graffeo. Chief Judge Lippman and Judges Ciparick and Jones concur. Judge Pigott dissents and votes to reverse in an opinion in which Judges Read and Smith concur.

Decided May 11, 2010

APPENDIX B — OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT DECIDED JULY 10, 2009

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

615.1
CA 08-02582

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff-Appellant,

v.

CAYUGA COUNTY SHERIFF DAVID S. GOULD AND SENECA COUNTY SHERIFF JACK S. STENBERG, ET AL.,

Defendants-Respondents.

PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

Appendix B

OPINION AND ORDER

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 10, 2008 in an action for, inter alia, a declaratory judgment. The judgment, inter alia, denied the motion of plaintiff for summary judgment and granted the cross motion of defendants Cayuga County Sheriff and Seneca County Sheriff for summary judgment.

It is hereby ORDERED that the judgment so appealed from is reversed on the law without costs, the motion is granted in part and judgment is granted in favor of plaintiff as follows:

It is ADJUDGED and DECLARED that Tax Law § 471-e exclusively governs the imposition of sales and excise taxes on cigarettes sold on a qualified reservation as that term is defined in Tax Law § 470 (16) (a), and

It is further ADJUDGED and DECLARED that plaintiff's two stores in question are located within a qualified reservation as that term is defined in Tax Law § 470 (16) (a), and the cross motion is denied and the declarations are vacated.

Opinion by HURLBUTT, J.P.:

This appeal presents two primary substantive issues for our consideration. First, we must determine whether Tax Law § 471-e (as amended by L 2005, ch 61, part K,

§ 2; ch 63, part A, § 4) provides the exclusive means by which to tax cigarette sales on an Indian reservation to non-Indians or to Indians who are not members of that nation or tribe where the reservation is located (hereafter, non-member Indians), or whether Tax Law § 471 provides an independent basis for imposing a tax on such sales. Second, we must determine whether plaintiff's two convenience stores are located within a "[q]ualified reservation" as that term is defined in Tax Law § 470 (16) (a) (as amended by L 2005, ch 61, part K, § 1). We agree with plaintiff with respect to both issues, i.e., that section 471-e is the exclusive means for taxing such cigarette sales and that plaintiff's two stores are located within a qualified reservation. We therefore conclude that the judgment of Supreme Court (*Cayuga Indian Nation of N.Y. v Gould*, 21 Misc 3d 1142[A], 2008 NY Slip Op 52478[U]) should be reversed.

Factual Background

In 2003 plaintiff purchased property on the open market in Union Springs, Cayuga County and in Seneca Falls, Seneca County and has been operating a convenience store on the property in each county. It is undisputed that plaintiff sells from both stores unstamped cigarettes, upon which New York State sales taxes have not been paid, to both its Indian and non-Indian customers (*see* Tax Law § 471 [1]; § 471-e [1] [a]).

In May 2008 this Court determined in *Day Wholesale, Inc. v State of New York* (51 AD3d 383, 856 N.Y.S.2d 808) that the amended version of Tax Law

§ 471-e was not "in effect" based on the failure of the Department of Taxation and Finance (Department) to take action to implement that statute by issuing necessary coupons. We wrote in *Day Wholesale* that section 471-e, entitled "Taxes imposed on qualified reservations," "embodie[d] the Legislature's most recent effort to collect taxes on cigarettes sold on Indian reservations" (*id.* at 384). Thereafter, law enforcement officials in Cayuga and Seneca Counties determined that plaintiff was selling unstamped cigarettes from non-reservation lands in violation of Tax Law § 471 and former § 1814. On November 25, 2008, a detective from the Cayuga County Sheriff's Office and an investigator from the Seneca County District Attorney's Office obtained search warrants in Supreme Court in each county and, pursuant thereto, law enforcement officials seized various items of property, including large quantities of unstamped cigarettes, from both stores.

Procedural History

On November 26, 2008, plaintiff commenced this action seeking, inter alia, the return of the property seized during the execution of the two search warrants and a declaration that plaintiff was not violating Tax Law §§ 471, 471-e, 473 or former § 1814 by selling unstamped cigarettes. The first cause of action seeks a declaration that, "because [section] 471-e is not in effect, [p]laintiff is under no obligation to pay or collect taxes on the cigarettes [it] sell[s]." The second cause of action alleges that, because Tax Law § 471-e is not in effect, the search warrants and subsequent seizure of property were

illegal. The third cause of action seeks the return of a computer on the ground that it was outside the scope of the applicable search warrant. The fourth cause of action seeks, inter alia, a preliminary injunction enjoining defendants "from alleging that [p]laintiff and/or its employees have violated . . . Tax Law §§ 471, 471-e, 473, or [former §] 1814 . . . ."

On the same day that plaintiff commenced this action, plaintiff also moved by order to show cause for relief similar to that requested in the complaint. The Cayuga County Sheriff and the Seneca County Sheriff (defendants) cross-moved to dismiss the complaint against them on several grounds. In the alternative, defendants sought to convert their cross motion to one for summary judgment dismissing the complaint against them. Upon notice to the parties, Supreme Court, Monroe County, converted plaintiff's motion to one seeking summary judgment, and also converted defendants' cross motion to one for summary judgment. Although the court rejected defendants' contention that declaratory relief was not a remedy available to plaintiff, the court denied plaintiff's motion. The court granted judgment declaring, inter alia, that Tax Law § 471-e did not "exclusively govern the imposition of sales and excise taxes on cigarettes" sold from the two stores and determined that the two stores in question are not located on qualified reservations. The court also "declared" that this Court's decision in *Day Wholesale* did not invalidate prosecutions under section 471 and former section 1814 (*Cayuga Indian Nation of N.Y.*, 21 Misc. 3d 1142A, 2008 NY Slip Op 52478[U], at *17).

Although we agree with the court that plaintiff properly sought declaratory relief, we disagree with the court's remaining conclusions. Instead, we conclude that section 471-e is the exclusive statute governing the imposition of sales and excise taxes on cigarettes sold on reservations. We further conclude that both stores are located within a qualified reservation, as that term is defined in section 470 (16) (a).

Availability of Declaratory Relief

As a preliminary matter, we note that defendants and amicus District Attorneys Association of New York State contend that a declaratory judgment action cannot be maintained by a party against whom a criminal proceeding is pending, relying primarily on *Kelly's Rental v City of New York* (44 NY2d 700) and *Matter of Morgenthau v Erlbaum* (59 NY2d 143, 451 N.E.2d 150, 464 N.Y.S.2d 392, *cert denied* 464 U.S. 993). We reject that contention. Although courts of equity "will *not* ordinarily intervene to enjoin the enforcement of the law by prosecuting officials" (*Reed v Littleton*, 275 NY 150, 153), a declaratory judgment action is available "in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" (*Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 206; *see Cooper v Town of Islip*, 56 AD3d 511, 512; *Ulster Home Care v Vacco*, 255 AD2d 73, 76-77).

In this case, plaintiff commenced the action the day after the search warrants were executed but before a

"criminal action" was commenced against it by the filing of an accusatory instrument (CPL 1.20 [17]). Plaintiff sought a declaration concerning its criminal liability pursuant to Tax Law §§ 471, 471-e, 473 and former § 1814, and no factual issues are in dispute. The reliance by defendants and amicus on *Kelly's Rental* for the proposition that a party cannot bring a declaratory judgment if a "[c]riminal proceeding" (CPL 1.20 [18]) is pending against that party is misplaced. Although in *Kelly's Rental* the Court of Appeals uses the term "criminal proceeding" instead of "criminal action," a criminal action had been commenced in that case when the declaratory judgment action was brought (*id.* at 702; *see Matter of Beneke v Town of Santa Clara*, 9 AD3d 820, 820-821, 780 N.Y.S.2d 827). Thus, under the facts of *Kelly's Rental*, plaintiff was not precluded from bringing this action inasmuch as a criminal action against it had not yet been commenced.

The reliance by defendants and amicus on *Morgenthau* for the proposition that only the People may commence a declaratory judgment action in this context is also misplaced (*see id.* at 152). In that case, the Court of Appeals stated that only the People could challenge an interlocutory ruling of a criminal court in the defendant's favor, noting that a defendant "always has available a right to appeal" (*id.*). The declaratory judgment action in *Morgenthau*, however, was commenced during the pendency of a criminal action, rather than prior to its commencement (*see id.* at 146). Thus, we conclude that the court properly determined that it could entertain this action insofar as it involved

the "application of certain statutes to plaintiff's undisputed conduct" and not "collateral review of the validity of the search warrants or the manner of [their] execution"(*Cayuga Indian Nation of N.Y.*, 21 Misc. 3d 1142A, 2008 NY Slip Op 52478[U], at *4; *see generally New York Foreign Trade Zone Operators, Inc. v State Liq. Auth.*, 285 NY 272, 276-278; *Dun & Bradstreet*, 276 NY at 206; *Bunis v Conway*, 17 AD2d 207, 208-209, *lv dismissed* 12 NY2d 645, 12 N.Y.2d 882).

Legislative and Executive History

Section 471 (1) of the Tax Law provides in relevant part that "[t]here is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax . . . ." It is well settled that a state is without power to tax cigarettes to be consumed on reservations by tribal members but has the power to tax on-reservation sales to non-Indians and non-member Indians (*see generally Oklahoma Tax Commn. v Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512-513; *Washington v Confederated Tribes of Colville Reservation*, 447 U.S. 134, 151, 160-161, *reh denied* 448 U.S. 911; *Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 481-483).

Prior to 2003, this State's attempts to collect the tax on cigarette sales to non-Indians were based solely on regulations promulgated by the Department

(*see e.g.* 20 NYCRR former 336.6, 336.7). 20 NYCRR former 336.6 (b) (3) defined qualified reservation as "the following reservations of the exempt Indian nations or tribes: Allegany Indian reservation, Cattaraugus Indian reservation, Oil Spring Indian reservation, Oneida Indian territory, Onondaga Indian reservation, Poospatuck Indian reservation, St. Regis Mohawk (Akwesasne) Indian reservation, Shinnecock Indian reservation, Tonawanda Indian reservation and Tuscarora Indian reservation." Under that definition, plaintiff's stores are not located on property that constituted a qualified reservation. Effective April 29, 1998, however, those regulations were repealed, based in part on enforcement difficulties faced by the Department (*see* NY Reg, Apr. 29, 1998, at 22-24), and the Department adopted a policy of forbearance, pursuant to which it suspended all attempts to collect the tax on reservation sales of cigarettes (*see generally Matter of New York Assn. of Convenience Stores v Urbach*, 92 NY2d 204, 213-215).

Soon after the repeal of the aforementioned regulations, litigation initiated by non-Indian convenience store owners resulted in the determination that the Department had a rational basis for refusing to enforce the regulations and could not be compelled to do so (*see Matter of New York Assn. of Convenience Stores v Urbach*, 275 AD2d 520, 522-523, *appeal dismissed* 95 NY2d 931, *lv denied* 96 NY2d 717, *cert denied* 534 U.S. 1056). Thereafter, in June 2001, the United States District Court for the Northern District of New York held in *Oneida Indian Nation of N.Y. v*

City of Sherrill, N.Y. (145 F Supp 2d 226) that various properties that had been acquired by the Oneida Nation of New York (OIN) on the open market were not taxable by the City of Sherrill and the counties in which they were located based on the doctrine of sovereign immunity (*see id.* at 253-254). Although the District Court's judgment was affirmed by the Second Circuit Court of Appeals and ultimately reversed by the United States Supreme Court (*id.*, *affd* 337 F3d 139, *revd* 544 U.S. 197, *reh denied* 544 U.S. 1057), we note that the District Court found "no evidence of any congressional act that disestablished the [OIN] Reservation" between the 1794 Treaty of Canandaigua, which confirmed and guaranteed the Reservation, and the present day (*id.* at 254). On May 15, 2003, while the appeal from the District Court's judgment was pending before the Second Circuit, the Legislature overrode the Governor's veto to pass chapter 62 of the Laws of 2003. Chapter 62, part T3, section 4 (as amended by L 2003, ch 63, part Z, § 4) created Tax Law former § 471-e, entitled "Taxes imposed on native American nation or tribe lands," provided that the Department was directed to "promulgate rules and regulations necessary to implement the collection of sales and use taxes on . . . cigarettes" where a non-Native American purchases such cigarettes "on or originating from native American nation or tribe land" (former § 471-e).

As noted, the Second Circuit thereafter affirmed the District Court's judgment in OIN's favor, holding that the OIN's aboriginal reservation was not disestablished by the 1838 Treaty of Buffalo Creek and that, because

the OIN's properties in the City of Sherrill that were purchased on the open market "are located within that reservation . . . Sherrill can neither tax the land nor evict the [OIN]" (*Oneida Indian Nation of N.Y.*, 337 F3d at 167). Two months later, in September 2003, the Department proposed regulations in response to Tax Law former § 471-e (*see* NY Reg, Sep. 24, 2003, at 18-21). To the extent relevant here, those proposed regulations defined qualified reservation as it is currently defined in section 470 (16) (*see Proposal of Indian tax enforcement provisions*, http://www.tax.state.ny.us/rulemaker/proposals.htm#2003 [NY St Dept of Tax & Finance, September 10, 2003, at 5-6]).

On April 23, 2004, the District Court determined that plaintiff's original reservation of approximately 64,000 acres had not been disestablished and that plaintiff was not subject to local zoning regulation (*see Cayuga Indian Nation of N.Y. v Village of Union Springs*, 317 F Supp 2d 128, 143, 151).

In June 2004, the Legislature passed a bill that essentially tracked the language of the Department's proposed regulations, including the definition of qualified reservation and the current language of Tax Law § 471-e (*see* 2004 NY Senate Bill S6822-B). The bill's Senate sponsor noted that, despite the passage of former section 471-e in 2003, the Department had refused to implement a system to collect "non-Indian taxes" (Sponsor's Letter, Veto Jacket, 2004 Senate Bill S6822-B). The legislation was vetoed by the Governor

(*see* Governor's Veto No. 265, Veto Jacket, 2004 Senate Bill S6822-B).

On March 27, 2005, the same proposed legislation, with minor amendments, came to the floor of the Senate and Assembly. On March 29, 2005, the United States Supreme Court issued its decision in *Oneida Indian Nation of N.Y.*, reversing the Second Circuit by holding that the OIN could not reassert sovereignty over lands that had been allocated to it in the 1794 Treaty of Canandaigua but that had been free of Indian ownership or control for 200 years (*see* 544 U.S. at 202-203). Two days later, on March 31, 2005, the Legislature passed chapter 61 of the Laws of 2005, amending, inter alia, Tax Law §§ 470 and 471-e. The Governor signed the bill into law on April 12, 2005 (*see* L 2005, ch 61).

On March 16, 2006, 15 days after coupons necessary to allow member Indians to purchase tax-free cigarettes were to be issued by the Department (*see generally* L 2005, ch 63, part A, § 4), the Department issued an advisory opinion stating that it was adhering to its policy of forbearance (*see* NY St Dept of Tax & Finance Advisory Op No. TSB-A-06[2]M). On May 2, 2008, this Court issued its decision in *Day Wholesale* holding that Tax Law § 471-e was not in effect because the Department had not issued the necessary coupons (*see* 51 AD3d at 388-389).

Appendix B

Discussion

I Section 471-e

Our first task is to discern the intent of the Legislature in its enactment of chapter 61 of the Laws of 2005. As amended by that chapter, Tax Law § 471-e (1) (a) provides that,

> "[n]otwithstanding any provision of this article to the contrary [. . . ,] Indians may purchase cigarettes for [their] own use or consumption exempt from cigarette tax on their nations' or tribes' qualified reservations. However, . . . Indians purchasing cigarettes off their reservations or on another nation's or tribe's reservation, and non-Indians making cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within this state. Accordingly, all cigarettes sold on an Indian reservation to non-members of the nation or tribe or to non-Indians shall be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp."

In resolving the parties' dispute concerning the meaning of Tax Law § 471-e, we are mindful that our function "is to ascertain and give effect to the intention of the Legislature" (McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a]), and that "statutory text is the

clearest indicator of legislative intent" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660). Nevertheless, "inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history'" (*Mowczan v Bacon*, 92 NY2d 281, 285, quoting *Matter of Sutka v Conners*, 73 NY2d 395, 403, 538 N.E.2d 1012, 541 N.Y.S.2d 191; *see Consedine v Portville Cent. School Dist.*, 12 NY3d 286, 290-291).

The Legislature's express imposition of the cigarette tax in Tax Law § 471-e and adoption of the proposed regulations of the Department demonstrate the intention of the Legislature to overhaul the statutory scheme and, in our view, to provide a single statutory basis for taxing cigarette sales on qualified reservations. Historically, the State of New York has not attempted to impose taxes on reservation cigarette sales unless a specific regulatory or statutory scheme was in place to differentiate between sales to Indians and sales to non-Indians or non-member Indians. Without such a scheme in place, it logically follows that no taxes may be collected or owed to the State by plaintiff. Moreover, the Legislature acted after the courts had determined that the Department had a rational basis for refusing to enforce the regulations (*see New York Assn. of Convenience Stores*, 275 AD2d at 522-523), and thus in 2005 the Legislature was aware that, although the Department was directed to promulgate regulations by former section 471-e, the Department was not required to enforce those regulations. The Legislature therefore recognized the need to have a separate statutory scheme

in place, aside from the general taxing provision of Tax Law § 471, in order to impose a cigarette tax on reservation sales to non-Indians and non-member Indians, while at the same time acknowledging that it was "without power" to tax reservation sales to qualified Indians (§ 471 [1]).

As this Court noted in *Day Wholesale*,

> "there is no question that the Legislature intended to create a procedure that would permit the State to collect cigarette taxes on reservation sales to non-Indians and non-members of the nation or tribe while simultaneously exempting from such tax reservation sales to qualified Indian purchasers. Because both aspects of the procedure *must function simultaneously*, the Legislature provided for a system utilizing Indian tax exemption coupons to distinguish taxable sales from tax-exempt sales. Without the coupon system in place, cigarette wholesale dealers and reservation cigarette sellers have no means by which to verify sales to tax-exempt purchasers"

(51 AD3d at 387 [emphasis added]). Given the recognition of the Legislature that the sovereignty considerations attendant upon imposing and collecting a state cigarette tax on reservation sales renders Tax Law § 471 alone insufficient to impose the tax and its express imposition of the tax in section 471-e, as well as

our decision in *Day Wholesale* that section 471-e is not in effect, we are compelled to conclude that there is no statutory basis for the imposition of a cigarette tax on a qualified reservation as that term is defined in section 470 (16) (a). Thus, possession or sales of untaxed cigarettes on qualified reservations cannot subject the seller or possessor to criminal prosecution.

II Qualified Reservation

Of course, if the convenience stores in question were not situated on a qualified reservation, as defendants contend, then Tax Law § 471-e would be inapplicable, and the stores would be fully subject to taxation under section 471 and, more to the point, to criminal prosecution under former section 1814. We conclude, however, that the Legislature intended to include the subject properties within the definition of a qualified reservation. Tax Law § 470 (16) provides a four-part definition of the term qualified reservation. We note that of relevance in this case is the fact that subdivision (a) defines a qualified reservation as "[l]ands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state . . . ." In 2003, when the Department drafted the proposed regulations that were then adopted by the Legislature, federal common law provided that Indian nations or tribes could purchase land on the open market and regain sovereignty over that land provided that the land was within that nation's or tribe's original reservation (*see generally Oneida Indian Nation of N.Y.*, 337 F3d at 155-157). It is in this context that the definition of

qualified reservation was proposed by the Department and subsequently adopted by the Legislature. We conclude that the Legislature intended that the definition of qualified reservation reflect the existing federal common law at the time that the legislation was passed. Thus, under the plain language of the statute and consistent with legislative intent, the two properties in question in this case qualify as "[l]ands held by an Indian nation or tribe" as contemplated by the statute (§ 470 [16] [a]).

We acknowledge that the language of Tax Law § 470 (16) (a) does not take into consideration the Supreme Court's determination in *Oneida Indian Nation of N.Y.* that Indian nations cannot regain sovereignty over such lands (*see* 544 U.S. at 202-203). Nevertheless, that case was decided well after the definition of qualified reservation was crafted by the Department, and only two days prior to the enactment of section 470 (16) adopting that definition. Moreover, it is apparent that the Legislature intended to include within the definition of qualified reservation properties such as those in question in this case. Subdivision (b) of section 470 (16) expressly includes a concept of sovereignty in the definition of qualified reservation as "[l]ands . . . over which an Indian nation or tribe exercises governmental power . . . ." In contrast, subdivision (a) contains no mention of sovereignty. We thus agree with plaintiff that the clear legislative intent was to omit any consideration of sovereignty under subdivision (a).

As the legislative and executive history preceding the enactment of chapter 61 of the Laws of 2005 noted above makes clear, the Legislature intended the definition of qualified reservation to comport with the holdings of the District Court and Second Circuit Court of Appeals in *Oneida Indian Nation of N.Y.* that there has been no disestablishment of the reservation lands ceded to the OIN (and to plaintiff) by the Treaty of Canandaigua (*see* 337 F3d at 161-165; 145 F Supp 2d at 254). The Supreme Court found it unnecessary to address that issue when it reversed the Second Circuit in *Oneida Indian Nation of N.Y.* (*see* 544 U.S. at 215 n 9). We are thus persuaded that, based on the current state of the federal common law, plaintiff's reservation has not been disestablished and thus constitutes a qualified reservation pursuant to the plain language of Tax Law § 470 (16) (a). We therefore conclude that the two stores at issue in this case, which are located on plaintiff's original reservation, are located on a qualified reservation.

Conclusion

In sum, the legislative purpose, context, and history of Tax Law § 471-e lead to the conclusion that it exclusively governs the imposition of sales and excise taxes on cigarettes sold on a qualified reservation as that term is defined in section 470 (16) (a). Further, both of plaintiff's stores are located within a qualified reservation as that term is defined in section 470 (16) (a).

Accordingly, we conclude that the judgment should be reversed, plaintiff's motion granted in part, judgment granted in favor of plaintiff declaring that section 471-e exclusively governs the imposition of sales and excise taxes on cigarettes sold on a qualified reservation as that term is defined in section 470 (16) (a) and that plaintiff's two stores in question are located within a qualified reservation as that term is defined in section 470 (16) (a), defendants' cross motion denied and the declarations vacated.

CENTRA, GREEN, and GORSKI, JJ., concur with HURLBUTT, J.P.; PERADOTTO, J., dissents and votes to affirm in the following Opinion: I respectfully dissent, and would affirm. I agree with the majority that plaintiff's two convenience stores are located on a "[q]ualified reservation" as that term is defined in Tax Law § 470 (16) (a) and that declaratory relief is available to plaintiff on the facts of this case. I cannot agree with the majority's conclusion, however, that Tax Law § 471-e is the exclusive statute governing the imposition of sales and excise taxes on cigarettes sold on Indian reservations. In my view, the majority's conclusion is belied by the plain language of the statute and its legislative history. The statutory tax obligation on all cigarettes possessed for sale in New York State—including cigarettes sold by reservation retailers to non-Indians and Indians who are not members of that nation or tribe where the reservation is located (non-member Indians)—is imposed by Tax Law § 471. In my view, section 471-e does not circumscribe the long-standing tax obligation imposed by section 471. To the contrary, section 471-e establishes a statutory mechanism for the *collection* of that tax from reservation sales to non-Indians and non-member Indians which have historically evaded the cigarette tax.

Statutory Text

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208), and that

"the most direct way to effectuate the will of the Legislature is to give meaning and force to the words of its statutes" (*Desiderio v Ochs*, 100 NY2d 159, 169). To that end, "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91).

Tax Law § 471 (1) clearly and unambiguously provides:

> "*There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale*, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax . . . It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof" (emphasis added).

Section 471 (2) requires that stamping agents "purchase stamps and affix such stamps in the manner prescribed to packages of cigarettes to be sold within the state . . . ." There is no language in section 471 exempting reservation sales from the cigarette tax or otherwise limiting the applicability of the tax based upon where in the state such sales take place or to whom such sales are made. Rather, the plain language of section 471

imposes a tax on all cigarettes possessed for sale in the state except where the state lacks the power to impose such a tax (*see* § 471 [1]). It is by now well settled that a state is without power to tax reservation cigarette sales to tribal members for their own consumption (*see Department of Taxation and Fin. of N.Y. v Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64; *Moe v Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-481). It is equally well settled, however, that the tax obligation imposed by section 471 validly applies to reservation sales to non-Indians and non-member Indians (*see Milhelm Attea & Bros.*, 512 U.S. at 64; *Snyder v Wetzler*, 84 NY2d 941, 942). As the United States Supreme Court recognized in *Milhelm Attea & Bros.*, Tax Law § 471 (1)

> "imposes a tax on all cigarettes possessed in the State except those that New York is without power' to tax . . . Because New York lacks authority to tax cigarettes sold to tribal members for their own consumption . . . , cigarettes to be consumed on the reservation by enrolled tribal members are tax exempt and need not be stamped. *On-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state taxation*" (512 U.S. at 64 [emphasis added]).

Thus, the clear, mandatory language of section 471 requires that stamping agents affix tax stamps to all cigarettes that the state has the power to tax, including

cigarettes sold by reservation retailers to non-Indians and non-member Indians (*see City of New York v Milhelm Attea & Bros., Inc.*, 550 F Supp 2d 332, 346, *reconsideration denied* 591 F Supp 2d 234).

The enactment of the current version of Tax Law § 471-e in 2005 did not, as the majority concludes, alter the tax obligation imposed by section 471. Rather, section 471-e sets forth a comprehensive procedure to collect cigarette taxes in connection with reservation sales to the general public while permitting tribal members to purchase tax-free cigarettes for their own consumption (*see Day Wholesale, Inc. v State of New York*, 51 AD3d 383, 387). Also, contrary to the conclusion of the majority, section 471-e does not "impose" a tax on reservation sales to non-Indian consumers. The tax obligation enforced by section 471-e predated the enactment of that statute (*see* § 471 [1]; *see also Milhelm Attea & Bros.*, 512 U.S. at 64). In concluding that section 471-e creates a tax obligation independent of section 471, the majority relies on subdivision (1) (a) of section 471-e, which provides:

> "Notwithstanding any provision of this article to the contrary qualified Indians may purchase cigarettes for such qualified Indians' own use or consumption exempt from cigarette tax on their nations' or tribes' qualified reservations. However, such qualified Indians purchasing cigarettes off their reservations or on another nation's or tribe's reservation, and non-Indians making

> cigarette purchases on an Indian reservation shall not be exempt from paying the cigarette tax when purchasing cigarettes within this state. Accordingly, all cigarettes sold on an Indian reservation to non-members of the nation or tribe or to non-Indians shall be taxed, and evidence of such tax will be by means of an affixed cigarette tax stamp."

Subdivision (1) (a), the introduction to section 471-e, merely recites the undisputed proposition that cigarettes purchased by enrolled tribal members on tribal lands are tax exempt, while cigarette sales to all other persons are subject to the cigarette tax. The remainder of the statute establishes a system for the collection of the cigarette tax as applied to reservation sales to non-Indians and non-member Indians. Reading section 471 together with section 471-e thus compels the conclusion that the former section imposes the tax on cigarettes, which includes cigarettes sold on reservations to non-Indians and non-member Indians, while the latter section establishes a mechanism for enforcing and collecting the tax on qualified reservations and preserves the tax exemption enjoyed by qualified Indians (*see Day Wholesale*, 51 AD3d at 384-385). As Supreme Court explained in this case, "[s]ection 471-e was merely designed to facilitate the state's collection of cigarette taxes arising from Indian sales to non-Indian consumers" (*Cayuga Indian Nation of N.Y. v Gould*, 21 Misc 3d 1142[A], 2008 NY Slip Op 52478[U], *5).

The statutory text therefore does not support the majority's conclusion that Tax Law § 471-e limits the scope of section 471. In my view, if the Legislature intended to supersede or restrict the longstanding tax obligation imposed by section 471 with respect to reservation cigarette sales to non-Indians and non-member Indians, it would have so stated. Under the plain language of section 471, cigarettes sold by Indian retailers to the public are subject to the state's cigarette tax. In the absence of limiting language in section 471 or an explicit legislative directive in section 471-e, the enactment of the latter statute does not extinguish the tax liability imposed by the former statute.

Legislative History

The legislative history of Tax Law § 471-e also supports my view that the Legislature's intent in enacting that provision was to provide a statutory collection mechanism for the tax imposed by section 471. For more than two decades, the State has attempted—without success—to devise an effective means of enforcing and collecting the cigarette tax established by section 471 from reservation sales to non-Indians and non-member Indians. As this Court explained in *Day Wholesale*, section 471-e simply "embodies the Legislature's most recent effort to collect taxes on cigarettes sold on Indian reservations" (51 AD3d at 384).

In 1988, the Department of Taxation and Finance (Department) promulgated a series of regulations to facilitate the collection of sales and excise taxes on

reservation sales, including cigarette sales, to non-Indians (*see* 20 NYCRR former 335.4, 335.5; *Matter of New York Assn. of Convenience Stores v Urbach*, 92 NY2d 204, 209). The regulations, which were based on a system of "probable demand," provided that stamping agents would supply registered dealers with unstamped or specially stamped cigarettes for tax-exempt sales and with stamped cigarettes for taxable sales to non-Indians (NY Reg, Sept. 14, 1988, at 45). As the majority points out, the regulations were repealed 10 years later, based in part on enforcement difficulties faced by the Department (*see* NY Reg, Apr. 29, 1998, at 22-24). Nonetheless, the Department specifically recognized that "[t]he repeal of the regulations does not eliminate the *statutory liability* for the taxes as they relate to sales on Indian reservations to non-exempt individuals" (*id.* at 23 [emphasis added]).

After the repeal of the regulations, the Department publicly articulated a "forbearance" policy, pursuant to which it suspended its enforcement efforts to collect the tax imposed by Tax Law § 471 on reservation sales of cigarettes (*see Milhelm Attea & Bros.*, 550 F Supp 2d at 346; *see also New York Assn. of Convenience Stores*, 92 NY2d at 213-215). As a result of the forbearance or, in the words of Supreme Court in this case, the "paralysis" of the Department in enforcing the cigarette tax as applied to reservation sales to non-Indians (*Cayuga Indian Nation of N.Y.*, 21 Misc. 3d 1142A, 2008 NY Slip Op 52478[U], at *7), the Legislature interceded and, in 2003, enacted the first version of section 471-e

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(*see* L 2003, ch 64, part T3, § 4, as amended by L 2003, ch 63, part Z, § 4). The statute provided that,

> "[w]here a non-native American person purchases, for such person's own consumption, any cigarettes . . . on or originating from native American nation or tribe land . . . , the commissioner shall promulgate rules and regulations necessary to implement the collection of sales, excise and use taxes on such cigarettes or other tobacco products."

It is clear from the face of the statute that the purpose of section 471-e was not to *impose* a tax on cigarettes sold to non-Indians and non-member Indians on reservations, but to require the Department to establish the rules and regulations required to *collect* the tax imposed by section 471. The Governor's veto message explained that the statute "would mandate that the Department . . . begin *collecting taxes* on retail purchases by non-Native Americans on Native American reservation land" (Governor's Veto No. 2, Veto Jacket, 2003 Assembly Bill 2106-B [emphasis added]). The Commissioner of the Department criticized the bill, noting that "the Tribes are not inclined to assist the State in the *collection* of state taxes," and he stated that the bill "proposes no new approach or solutions to this tax *collection* dilemma" (Commissioner's Letter, Veto Jacket, 2003 Assembly Bill 2106-B [emphasis added]).

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Pursuant to Tax Law former § 471-e, the Department developed regulations to collect taxes on reservation cigarette sales to non-Indians (*see* NY Reg, Sept. 24, 2003, at 18-21). The stated purpose of the regulations was "[t]o implement the collection of excise taxes and sales and compensating use taxes on retail sales made to non-Indians on New York State Indian reservations (*id.* at 18; *see also id.* at 20 [Chapters 62 (Part T3) and 63 (Part Z) of the Laws of 2003 mandate that the Commissioner adopt rules and regulations to effectuate the collection of taxes on retail sales made to non-Indians on Indian reservations in this State."]). Significantly, the Department noted that "[t]his tax liability of non-Indian consumers is a feature of current law and has been for some time" (*id.* at 20). Thus, the Department recognized that section 471-e did not impose a new tax. Instead, the statute directed the Department to establish a "mechanism [ ]" for the collection of taxes long imposed by New York law (*id.*).

The proposed regulations, however, were never adopted. Thus, in June 2004, the Legislature passed a bill mirroring the language of the proposed regulations and including the current language of Tax Law § 471-e (*see* 2004 NY Senate Bill S6822-B). As the Senate sponsor stated, "[t]his bill codifies existing Department . . . regulations to implement its provisions to collect taxes from non-Native Americans who purchase cigarettes . . . on Native American reservations. The bill allows New York State to collect [those] taxes at the distributor level before they are transported onto the reservation" (Sponsor's Letter, Veto Jacket, 2004 NY

Senate Bill S6822-B). Although that bill was vetoed by the Governor, it was reintroduced with minor amendments the following year, and it was signed into law on April 12, 2005 (*see* L 2005, ch 61, part K, § 2).

As the legislative history of the statute makes plain, Tax Law § 471-e did not create a new tax or limit the scope of the tax liability imposed by section 471. Rather, when the Department refused to implement a regulatory framework for the collection of the tax imposed by section 471, the Legislature enacted a comprehensive statutory collection scheme by means of the amended section 471-e. Far from impairing the tax obligation established in section 471, the clear intent of section 471-e was to collect the taxes lawfully imposed pursuant to section 471 by requiring all cigarettes intended for sale—whether on or off a reservation and whether to Indians or non-Indians—to be tax stamped. Thus, the legislative history does not support the majority's conclusion that "[t]he Legislature . . . recognized the need to have a separate statutory scheme in place, aside from the general taxing provision of Tax Law § 471, in order to impose a cigarette tax on reservation sales . . . ." Rather, in enacting section 471-e, the Legislature recognized that the executive branch was not going to enforce the cigarette tax imposed by section 471 in the absence of explicit legislative directives. As a result, the Legislature crafted a statutory collection scheme to address the particular obstacles posed by reservation cigarette sales. The tax liability established by section 471 was unaffected.

Appendix B

The Impact of *Day Wholesale*

In my view, this Court's decision in *Day Wholesale* does not compel a different result. In that case, we merely determined that the specific collection method outlined in Tax Law § 471-e is not in effect because the State failed to implement the tax exemption coupon system, which we determined was necessary "to the functioning of the procedure set forth in the amended version of Tax Law § 471-e" (51 AD3d at 387). Our decision in that case did not disturb the underlying obligation to pay the taxes imposed by section 471. To the contrary, we recognized that the tax obligation on cigarettes stems from section 471, not section 471-e, and stated:

> "Pursuant to Tax Law § 471 (2), the ultimate liability for the cigarette tax falls on the consumer, but the cigarette tax is advanced and paid by agents . . . through the use of tax stamps . . . The tax applies to all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax' . . . Those circumstances pertain only to some of the cigarettes sold on Indian reservations" (*id.* at 384).

The fact that, as a result of *Day Wholesale*, the particular collection scheme established in section 471-e is no longer "in effect" (*id.*) does not relieve

reservation retailers of their legal obligation to sell only tax-stamped cigarettes to non-Indian and non-member Indian purchasers. The tax liability imposed by section 471 remains regardless of whether the State has a statutory mechanism in place for the effective collection of the required taxes from Native American retailers.

In a recent federal case, the District Court of the Eastern District of New York rejected the defendants' claims that our decision in *Day Wholesale* altered the scope of Tax Law § 471 (*see Milhelm Attea & Bros.*, 591 F Supp 2d at 237). In that case, the City of New York commenced an action against cigarette wholesalers for violation of the federal Contraband Cigarette Trafficking Act (18 USC § 2341 *et seq.*), alleging that the defendants shipped unstamped cigarettes to Indian retailers who re-sold the cigarettes to the general public in violation of section 471 (*see Milhelm Attea & Bros.*, 591 F Supp 2d at 235). After this Court's decision in *Day Wholesale*, the defendants moved for reconsideration of the District Court's order denying their motions to dismiss, arguing "that stamping agents are not required to affix tax stamps on cigarettes sold to reservation retailers until the Department issues and distributes tax exemption coupons pursuant to [section] 471-e" and that, therefore, the defendants' sale of unstamped cigarettes did not violate New York law (*id.* at 236). In denying defendants' motion for reconsideration, the District Court stated:

> "This Court does not disagree with the contention that [section] 471-e was intended

by the New York legislature to provide a mechanism to collect taxes on re-sales of cigarettes by Native American retailers to non-tribe members. The current enforceability of that statute, however, does not alter the scope of [section] 471 or its legal force. Those sales do not become non-taxable events with the Appellate Division's decision in *Day Wholesale*; rather, the court in that case found that statutorily prescribed pre-conditions for one proposed mechanism of collection have not been met" (*id.* at 237-238).

The Department's Forbearance Policy

The majority states that, "[h]istorically, the State of New York has not attempted to impose taxes on reservation cigarette sales unless a specific regulatory or statutory scheme was in place to differentiate between sales to Indians and sales to non-Indians or non-member Indians. Without such a scheme in place, it logically follows that no taxes may be collected or owed to the State by plaintiff." I cannot agree with the majority's reasoning. As discussed above, the State has imposed taxes on cigarette sales to non-Indians-whether on or off a qualified reservation--for decades. While it is true that the Department has adopted a longstanding policy of "forbearance"[1] pursuant to which it has not

1. In my view, the fact that the Department has a "forbearance policy" with respect to the collection of cigarette taxes from Indian sellers suggests that the tax obligation is independent of any regulatory or statutory framework for the collection of such taxes.

sought to collect those taxes on reservation sales, an administrative agency's non-enforcement policy does not and cannot nullify a tax obligation created by statute (*see Milhelm Attea & Bros.*, 550 F Supp 2d at 347 ["The (District) Court recognizes that the Department has publicly articulated a forbearance policy on the collection of taxes from the sale of cigarettes by stamping agents to reservation retailers . . . However, an enforcement decision by the Department does not serve to obviate state legislation."]). "Simply stated, states require' certain conduct via duly enacted laws; the failure of the executive branch to enforce the law is not the same as saying that the legislative branch has repealed it" (*United States v Morrison*, 521 F Supp 2d 246, 254). While the majority may be correct in concluding that, in the absence of the collection scheme established by section 471-e, it may be difficult or impossible for the State to *collect* cigarette taxes from reservation retailers, it does not "logically follow []" that no taxes are *owed* by plaintiff.

Conclusion

The tax liability imposed by Tax Law § 471 is independent of any particular regulatory or statutory framework established to collect the tax. Accordingly, I would affirm the judgment denying plaintiff's motion for summary judgment and granting defendants' cross motion for summary judgment and declaring that section 471-e does not exclusively govern the imposition of sales and excise taxes on cigarettes sold in plaintiff's two stores and that our decision in *Day Wholesale* does

not foreclose prosecutions under the Tax Law. Regardless of whether the State can effectively collect cigarette taxes on reservation sales to non-Indians and non-member Indians, section 471 (1) mandates that all such sales are "subject to tax" and, thus, reservation retailers who flout that obligation risk prosecution under former section 1814.

Entered: July 10, 2009

Patricia L. Morgan
Clerk of the Court

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF NEW YORK, MONROE COUNTY DATED AND DECIDED DECEMBER 9, 2008

SUPREME COURT OF NEW YORK,
MONROE COUNTY

Index No. 2008-16350

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff,

v.

CAYUGA COUNTY SHERIFF DAVID S. GOULD, SENECA COUNTY SHERIFF JACK S. STENBERG, CAYUGA COUNTY DISTRICT ATTORNEY JON E. BUDELMANN, SENECA COUNTY DISTRICT ATTORNEY RICHARD E. SWINEHART,

Defendants.

DECISION & ORDER

This is an action for declaratory and injunctive relief pursuant to CPLR § 3001 and Article 63. The complaint seeks in its first cause of action a declaration that NY Tax Law §471-e, as amended by L.2005, ch. 61, part K, as amended by L. 2005, ch. 63, §4, exclusively governs plaintiff's obligation to pay or collect taxes on the cigarettes they sell on property owned by plaintiff's members, and that therefore the Cayuga Indian Nation

has not evaded or avoided the payment of cigarette taxes in violation of Tax Law §1814. In the second cause of action, plaintiff seeks a declaration that, by virtue of the Fourth Department's decision in *Day Wholesale, Inc. v. State of New York*, 51 AD3d 383, 856 N.Y.S.2d 808 (4th Dept. 2008), which upheld a preliminary injunction directed against the State and Attorney General precluding enforcement of Tax Law §471-e, as amended, regarding the taxation of cigarettes on Indian reservations on the ground that the amended version of the statute is not presently in effect, the search warrant issued to Cayuga and Seneca County law enforcement authorities on November 25, 2008, and the seizures made thereunder on the same day, were illegal and unauthorized, and that the property seized must be returned to the owners.

In the third cause of action, plaintiff seeks a declaration that the Cayuga County law enforcement authorities who executed the warrant exceeded the scope of the warrant's authorization by seizing a computer used in, and essential to, the operation of the Union Springs store, which also sells gasoline. The fourth cause of action seeks an injunction restraining defendants from pursuing a threatened criminal prosecution by "alleging that Plaintiff and/or its employees have violated New York Tax Law §§471, 471-e, 473, or 1814, at least until such time as the Tax Department has taken the necessary actions and promulgated the necessary rules or regulations to implement the Indian tax exemption coupon system under §471-e." Finally, in plaintiff's prayer for relief and

in the paragraph entitled Nature of the Case in paragraphs 1-2 of the complaint, plaintiff seeks an order "requiring the Defendants immediately to return the Plaintiff's property that was seized pursuant to the unlawfully obtained search warrants."

By order to Show Cause, plaintiff seeks a preliminary injunction which (1) orders defendants to return all property issued pursuant to the two search warrants; and (2) enjoins defendants from alleging that plaintiff or its employees have violated Tax Law §§ 471, 471-e, 473, and 1814. The motion also seeks an order and judgment declaring that section 471-e is not in effect; that by possessing unstamped cigarettes, plaintiff is not in violation of section 1814; and that therefore the seizure of property pursuant to the warrants was unlawful.

By Notice of Cross-Motion, defendants Gould and Stenberg, the sheriffs of Cayuga and Seneca counties, respectively, seek an order dismissing the complaint pursuant to CPLR 3211(a)(1) (defenses based on documentary evidence), (a)(5) (collateral estoppel), and (a)(7) (failure to state a cause of action). In the alternative, these two defendants seek conversion of plaintiff's motion to one for summary judgment, and they move for summary judgment dismissing the complaint as against them. The other defendants have not similarly so moved, but have opposed plaintiff's motion for a preliminary injunction.

At oral argument, however, plaintiff suggested, and all defendants agreed, that the motion for a preliminary injunction and the motions to dismiss should be converted to cross-motions for summary judgment on due notice to all parties. A motion for a preliminary injunction opens the record and permits the court to pass on the sufficiency of the parties' respective claims and defenses. *Guggenheimer v. Ginzburg*, 43 NY2d 268, 272, 372 N.E.2d 17, 401 N.Y.S.2d 182 (1977); *Berio v. Berio*, 143 AD2d 866, 867-68, 533 N.Y.S.2d 531 (2d Dept. 1988). *See also*, *Rochester City School District v. County of Monroe*, 13 AD3d 1052, 1053, 788 N.Y.S.2d 739 (4th Dept. 2004). It is the duty of the court in this declaratory judgment action to "declar[e] the rights of the parties." *Village of Webster v. Town of Webster*, 270 AD2d 910, 705 N.Y.S.2d 774 (4th Dept. 2000).

Availability of Declaratory and Injunctive Relief

A threshold question raised by defendants in their consolidated response to the motion is whether collateral declaratory relief is available to the target of a criminal investigation, and whether coercive relief in the nature of an injunction directed against local law enforcement authorities is at all appropriate in these circumstances. Despite some statements in cases that "only an application for declaratory relief by the People should be entertained," *Matter of Morganthau v. Erlbaum*, 59 NY2d 143, 152, 451 N.E.2d 150, 464 N.Y.S.2d 392 (1983) (citing *Kelly's Rental v. City of New York*, 44 NY2d 700, 376 N.E.2d 915, 405 N.Y.S.2d 443 (1978)), the Court of Appeals has sanctioned as "an appropriate use of a

declaratory judgment action to challenge a criminal statute," a potential criminal defendant's use, after three acquittals during successive vagrancy prosecutions, of CPLR 3001 to seek "a declaration that the vagrancy statute was unconstitutional on its face." *Id.* 59 NY2d at 151, *discussing Fenster v. Leary*, 20 NY2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967). *See, Erlbaum*, 59 NY2d at 150-51, which described *New York Foreign Trade Zone Operators v. State Liquor Authority*, 285 NY 272, 34 N.E.2d 316 (1941) as also involving an appropriate use of a declaratory judgment action brought by a plaintiff who "potentially faced criminal prosecution" seeking a declaration whether, in the undisputed circumstances of that case, a distiller's license was required to conduct plaintiff's activities of "import[ing] liquor into a trade zone, where it diluted the spirits, repackaged them, and then shipped them to other parts of the United States or to foreign countries." *Erlbaum*, 59 NY2d at 151.

In none of these cases was the plaintiff "[a] party against whom a criminal proceeding is pending" at the time of commencement of the declaratory judgment action such that he or she "may not seek declaratory relief." *Kelly's Rental, Inc. v. City of New York*, 44 NY2d at 702. Cf., *Cooper v. Town of Islip*, 56 AD3d 511, 867 N.Y.S.2d 205, 2008 WL 4890009 (2d Dept. 2008) (criminal action pending). *See also, People v. Mateo*, 2 NY3d 383, 400-01, 811 N.E.2d 1053, 779 N.Y.S.2d 399 (2004); *Oglesby v. McKinney*, 28 AD3d 153, 158, 809 N.Y.S.2d 334 (4th Dept. 2006), *aff'd*, 7 NY3d 561, 565, 858 N.E.2d 1136, 825 N.Y.S.2d 431 (2006). The argument that

entertaining an action for declaratory relief would interfere in the proper administration of criminal justice was, for cases of the current kind, ultimately laid to rest in *New York Foreign Trade Zone Operators v. State Liquor Authority*, 285 NY at 277-78; *Playtogs Factory Outlet, Inc. v. Orange County*, 51 AD2d 772, 780, 379 N.Y.S.2d 859 (2d Dept. 1976) (collecting cases); *Bemis v. Conway*, 17 AD2d 207, 208-09, 234 N.Y.S.2d 435 (4th Dept. 1962) (" '[r]esort to this remedy and also to that of an injunction may be had even with respect to penal statutes and against a public official or public agency whose duty it is to conduct appropriate prosecutions' ") (quoting *De Veau v. Braisted*, 5 AD2d 603, 606-07, 174 N.Y.S.2d 596, *aff'd*, 5 NY2d 236, 157 N.E.2d 165, 183 N.Y.S.2d 793, *aff'd*, 363 U.S. 144, 80 S.Ct. 1146, 4 L. Ed. 2d 1109); *Rockland County Multiple Listing System, Inc. v. State*, 72 AD2d 742, 743, 421 N.Y.S.2d 254 (2d Dept. 1979).

The absence of a pending criminal action at the time of commencement makes it discretionary whether to entertain this action for declaratory relief. *Benecke v. Town of Santa Clara*, 9 AD3d 820, 780 N.Y.S.2d 827 (3d Dept. 2004) ("petitioner failed to avail himself of this remedy *prior to* the commencement of the criminal action") (emphasis supplied); *Royal Service LLC v. Village of Monticello*, 247 AD2d 779, 781, 669 N.Y.S.2d 410 (3d Dept. 1998). That discretion is exercised in favor of entertaining the action insofar as it does not concern a collateral review of the validity of the search warrants or the manner of execution of the Cayuga County warrant. *Calderon v. City of Buffalo*, 61 AD2d 323, 326-

27, 402 N.Y.S.2d 685 (4th Dept. 1978). There are no factual issues, as only questions of law about the application of certain statutes to plaintiff's undisputed conduct are presented. *Erlbaum*, 59 NY2d at 150-51. The defendant district attorneys, in their memoranda of law, each posit that there is a factual issue inasmuch as the targets of the investigation have not explicitly admitted that they sold untaxed cigarettes as alleged in the warrant applications. But that argument strains this record; plaintiff's complaint is wholly premised on the proposition that their members indeed do sell untaxed cigarettes on the parcels targeted for search, and that this is permissible under our law and at oral argument, plaintiff's attorneys made this concession explicit. The first two causes of action are, therefore, cognizable in this declaratory proceeding.

The balance of the complaint, directed to the manner of the Cayuga County search and seeking an injunction prohibiting prosecutions and a return of the seized property, is subject to a different analysis. The remedy of prohibition is not available to remedy an unconstitutional search conducted pursuant to a warrant which has already been executed, *Matter of James "N" v. D'Amico*, 139 AD2d 302, 308-09, 530 N.Y.S.2d 916 (4th Dept. 1988) (Boomer and Pine, J.J., concurring), but a writ will lie to challenge the territorial jurisdiction of a criminal court over a crime. *Matter of Taub v. Altman*, 3 NY3d 30, 33 n.2, 814 N.E.2d 799, 781 N.Y.S.2d 492 (2004); *Matter of Rush v. Mordue*, 68 NY2d 348, 353, 502 N.E.2d 170, 509 N.Y.S.2d 493 (1986); *Matter of Steingut v. Gold*, 42 NY2d 311, 366 N.E.2d 854, 397 N.Y.S.2d 765 (1977).

Appendix C

Separately, a writ of prohibition is available to obtain return of seized property after an unreasonable length of time in a case of an unfocused investigation in which there was no indication that the property seized would ever form the basis of a criminal prosecution. *Matter of B.T. Productions v. Barr*, 44 NY2d 226, 376 N.E.2d 171, 405 N.Y.S.2d 9 (1978). On the other hand, the writ is unavailable in a case involving an "investigation of a particular criminal activity" and where it is determined that criminal prosecution has not been unreasonably delayed. *Matter of Agresta v. Roberts*, 66 AD2d 929, 930, 410 N.Y.S.2d 710 (3d Dept. 1978). This case is of the latter variety. In *Matter of Moss v. Spitzer*, 19 AD3d 599, 798 N.Y.S.2d 482 (2d Dept. 2005), for example, it was held that an Article 78 proceeding would not lie to obtain return of property seized under a warrant "first because the seized property ha[d] not been held for an inordinately long period of time, and second, because petitioners [we]re seeking, in effect, little more than a pre-indictment order suppressing evidence." *Id.* 19 AD3d at 600.

Nor will mandamus lie in circumstances such as these. *Matter of Manhattan Gold & Silver, Inc. v. Hynes*, 51 AD3d 671, 855 N.Y.S.2d 905 (2d Dept. 2008); *Matter of Marra v. Hynes*, 221 AD2d 539, 635 N.Y.S.2d 482 (2d Dept. 1995); *Matter of Burse v. Bristol*, 203 AD2d 962, 612 N.Y.S.2d 990 (4th Dept. 1994). Finally, replevin is not an appropriate remedy, because it would interfere with an impending criminal prosecution. *B.T. Productions, Inc. v. Barr*, 44 NY2d 226, 233 n.2, 376 N.E.2d 171, 405 N.Y.S.2d 9 (1978) ("in the typical

case replevin would not be an appropriate remedy since it would constitute an unjustified and unacceptable interference with a pending or potential criminal prosecution"); *SSC Corp. v. State of New York Organized Crime Task Force*, 128 AD2d 860, 513 N.Y.S.2d 779 (2d Dept. 1987); *Meegan v. Tracy*, 220 App. Div. 600, 602, 223 N.Y.S. 355 (3d Dept. 1927) (property seized pursuant to a search warrant is "beyond the reach of the requisition in replevin, while the necessity to use it in a criminal proceeding remained"); *Dwyer v. County of Nassau*, 66 Misc2d 1039, 1040, 322 N.Y.S.2d 811 (Sup. Ct. Nassau Co. 1971) (Meyer, J.). Accordingly, to the extent plaintiff's motion is for a preliminary injunction directing the return of the property, that motion is denied. By like reasoning, the defendant sheriffs' cross-motion for summary judgment dismissing the complaint as against them insofar as it seeks return of the same is granted, and the court declares that, on the current record, plaintiff is not entitled to a review of the manner of the Cayuga County search nor is plaintiff entitled to a return the seized property in a proceeding such as this. The remedy is a motion to suppress in any ensuing criminal action, or a writ if it appears that no prosecution will be brought.

Tax Law §471-e and Day Wholesale Do Not Warrant Relief

In support of plaintiff's motion for a preliminary injunction, plaintiff is required to establish a likelihood of success on its claim that a recently enacted statute governing taxation of cigarettes on Indian reservations, New York Tax Law §471-e, exclusively governs plaintiff's

obligation to pay or collect taxes on cigarettes sold in Seneca and Cayuga counties. If so, plaintiff is unquestionably entitled to relief. *See Day Wholesale, Inc. v. State of New York*, 51 AD3d 383, 856 N.Y.S.2d 808 (4th Dept. 2008). The court concludes, however, that the sale of cigarettes in each of these counties is not exclusively governed by §471-e as asserted in plaintiff's first cause of action. That provision did not establish the applicability of tax on these cigarettes and, in any event, the sales in question did not occur on "a qualified reservatio[n]" within the meaning of Tax Law §471-e(1)(a), or "Indian country" within the meaning of 18 U.S.C. §1151(a) ("all land within the limits of any Indian reservation under the jurisdiction of the United States Government").

The court agrees that the tax referred to in §1814 is the one imposed by §471, not §471-e. Section 471-e was merely designed to facilitate the state's collection of cigarette taxes arising from Indian sales to non-Indian consumers by requiring wholesalers to pay the tax earlier in the distribution chain than the previously enacted collection mechanisms contemplated. As defendants contend, §471-e does not create the tax obligation itself, although it refers to it. The tax obligation itself long ago was established by the legislature as applicable to qualified reservation and non-reservation sales alike to non-Indians, which was upheld by the Supreme Court in *Washington v. Confederated Trades of Colville Indian Reservation*, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980), and the New York courts in *Snyder v. Wetzler*, 193 AD2d 329,

603 N.Y.S.2d 910 (3d Dept. 1993) (tracing the relevant Supreme Court jurisprudence on the subject), *aff'd* 84 NY2d 941, 644 N.E.2d 1369, 620 N.Y.S.2d 813 (1994). These decisions predated enactment of §471-e. The Supreme Court well perceived the interplay between §471 and §1814:

> Article 20 of the New York Tax Law imposes a tax on all cigarettes possessed in the State except those that New York is "without power" to tax. N.Y.Tax Law § 471(1) (McKinney 1987 and Supp.1994). The State collects the cigarette tax through licensed agents who purchase tax stamps and affix them to cigarette packs in advance of the first sale within the State. The full amount of the tax is part of the price of stamped cigarettes at all subsequent steps in the distribution stream. Accordingly, the "ultimate incidence of and liability for the tax [is] upon the consumer." § 471(2). Any person who "willfully attempts in any manner to evade or defeat" the cigarette tax commits a misdemeanor. N.Y.Tax Law § 1814(a) (McKinney 1987).

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 64, 114 S.Ct. 2028, 2031, 129 L. Ed. 2d 52 (1994).

Similarly, in *Snyder v. Wetzler*, *supra*, and directly contrary to plaintiff's argument in this case, the Court of Appeals upheld the applicability of §471, even as

applied on established tribal reservations, over a claim that, as a general statute, §471 could not be applied on tribal lands under the doctrine of *Fellows v. Denniston*, 23 NY 420, 431-32 (1865). *Snyder v. Wetzler*, 84 NY2d 941, 644 N.E.2d 1369, 620 N.Y.S.2d 813, *aff'g*, 193 AD2d 329, 603 N.Y.S.2d 910 (*see* Brief for Appellant and Reply Brief for Appellant) (reproduced on WESTLAW). And in *Matter of New York State Dept. of Taxation and Finance v. Bramhall*, 235 AD2d 75, 667 N.Y.S.2d 141 (4th Dept. 1997), the court observed:

> " 'Even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.' " (*Rice v. Rehar*, 473 U.S. 713, 718, 103 S. Ct. 3291, 3295, 77 L. Ed. 2d 961, quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114). State taxation of sales of cigarettes and other products to non-Indians on reservations and other taxes directed toward the activity of non-Indians on reservations have been sustained notwithstanding Indian claims of sovereignty.

Id. 235 AD2d at 85. Inasmuch as the tax liability referred to in §1814 springs from §471, the fact that recently enacted §471-e has been judicially declared by *Day Wholesale* to be "not in effect" is of no moment. Nor does the Tax Department's apparent paralysis in this area, which has been styled a permanent forbearance

policy, *Day Wholesale, supra*; *New York Association of Convenience Stores v. Urbach*, 275 AD2d 520, 712 N.Y.S.2d 220 (3d Dept. 2000), rewrite or erase legislative enactments, i.e., in §1814 making a violation of §471 a crime. *Cf.*, *Gristede's Foods, Inc. v. Unkechauge Nation*, 532 F.Supp.2d 439, 449 (E.D.N.Y 2007) (regardless of whether the Department allows wholesalers or reservation retailers to sell unstamped cigarettes, the tax imposed by the statutes are lawful and may be enforced).

The foregoing is enough to dispose of this case. But it is worthwhile to consider the merit of plaintiff's subsidiary contention that, if §471-e was applicable, the sales at the two stores targeted for search occurred on a "qualified reservation" within the meaning of the statute. Notwithstanding plaintiff's argument to the contrary, a "qualified reservation" under the NY Tax Law §470(16)(a) ("[l]ands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state") refers of necessity (because the tax law does not explicate the definition further) to "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. §1151(a). Because there is no contention that the State of New York at any time created a separate or competing system of Indian reservations within the state, the only plausible interpretation of the word "qualified" is to link it with 18 U.S.C. §1151(a). *See also*, fn.1, *infra*. Accordingly, the naked reference to the Cayuga Indian Nation of New York in Tax Law §470(14) is no legislative creation, or recognition even, of a

particular "qualified reservation" belonging to the Cayuga Indian Nation not recognized as "Indian country" under 18 U.S.C. §1151(a).

Plaintiff attempts to divorce the concept of sovereignty from the concepts of "qualified reservation" or "reservation seller" under the pertinent provisions of the Tax Law. Plaintiff begins with §470(17), which defines a reservation seller as an Indian Nation or tribe, one or more members of a tribe, or an entity wholly owned by either or both, which sells cigarettes on a qualified reservation. Plaintiff proceeds to §470(14) which lists the Cayuga Indian Nation as an Indian Nation or tribe, and then concludes that §470(16)(a), by necessary implication from the foregoing two provisions, means that the Cayugas have a "qualified reservation" by virtue of its members' open market purchases of land, for some 200 years held by the non-Indian public and subject to regulation by New York State and its political subdivisions, within the 64,000+ acre aboriginal territory recognized in the Treaty of Canandaigua. While the separate definitions provided in §470(16)(a) and (b) support plaintiff's distinction between the question of sovereignty and that of "qualified reservation,"[1] it does not follow by necessary implication

1. It is more probable that the distinct definitions of §470(16)(a) and (b) follow the congressional reformulation of §1151(a)("Indian country") in 1948 to include lands "*not* presumptively tied to Indian ownership, land title or administration," *Thompson v. County of Franklin*, 314 F.3d 79, 90 (2d Cir. 2002) (Sack, J. dissenting), i.e., by uncoupling

(Cont'd)

or otherwise that, by themselves, §470(17) and §470(14) means that the parcels recently purchased by members of the Cayuga Nation are "[l]and held by an Indian Nation or tribe that is located within the reservation of that nation or tribe in the state." §470(16)(a). The Tax Law thus requires some other method of establishment of a reservation than in the provisions of the Tax Law itself to qualify a reservation as a "qualified reservation" within the meaning of the statute.

Recognition of the Cayuga's claim to qualified reservation status would come as surprising news to the Department of Taxation and Finance. The concept of "qualified reservations" first appeared in regulatory form and was contained in the "Exempt Organizations" regulations promulgated following enactment of Tax Law

(Cont'd)

reservation status from Indian ownership. *Id.* 314 F.3d at 89-90 (Sacks, J. dissenting). "After 1948, that is, the extinguishment of title alone should no longer be presumed to disestablish the jurisdictional boundaries of a reservation." *Id.* 314 F.3d at 90 (Sacks, J. dissenting). *See Solem v. Bartlett*, 465 U.S. 463, 468, 104 S.Ct. 1161, 1165, 79 L. Ed. 2d 443 (1984) ("Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.") (citing Act of June 25, 1948, ch. 645, § 1151, 62 Stat. 757 (codified at 18 U.S.C. § 1151)). The Supreme Court presumably was aware of this expanded definition, and the history behind it, ably described in *Wisconsin v. Stockbridge-Munsee Community*, 366 F.Supp.2d 698 (E.D.Wis. 2004), when it made its ruling in *City of Sherrill*. *See* discussion, *infra*, and at fn. 3, *infra*.

Appendix C

§ 1116 ("Exempt Organisations") and in particular subdiv. (a)(6):

> Section 529.9. Certain Indian nations or tribes. [Tax Law, §1116(a)(6)]
>
> (a) General.
>
> (1) The Indian nations or tribes specified in paragraph (2) of this subdivision are exempt from the sales and use tax on purchases of tangible personal property, services, food and drink, hotel occupancy, or admissions and dues. In addition, such tribes or nations, under circumstances described in subdivision (d) of this section, may make sales without collecting the sales or use tax.
>
> (2) Only the following Indian nations or tribes residing in New York State are entitled to exemption:
>
> Exempt Tribes and Nations
>
> Cayuga
> Oneida Indian Nation
> Onondaga Nation of Indians
> Poospatuck
> St. Regis Mohawk
> Seneca Nation of Indians

Appendix C

Shinnecock
Tonawanda Band of Senecas
Tuscarora Nation of Indians

Qualified Reservations

Allegany Indian Reservation
Cattaraugus Indian Reservation
Oneida Indian Territory
Onondaga Indian Reservation
Poospatuck Indian Reservation
St. Regis Indian Reservation
Shinnecock Indian Reservation
Tonawanda Indian Reservation
Tuscarora Indian Reservation

20 N.Y.C.R.R. § 529.9 (filed Nov. 24, 1982; amds filed Aug. 31, 1990; March 7, 1994 eff. March 23, 1994. amended (c)(2)). This duly promulgated regulation, *General Elec. Capital Corp. v. New York State Div. of Tax Appeals*, 2 NY3d 249, 254-55, 810 N.E.2d 864, 778 N.Y.S.2d 412 (2004), thus establishes that, so far as the Department of Taxation and Finance was concerned, the Cayuga Indian Nation had no reservation of its own under state law. *See also*, Tax Law §470(15) (second sentence) (implicit legislative recognition of the then current regulations). While not dispositive and "ha[ving] no legal effect standing alone," *Matter of UCP-Bayview Nursing Home v. Novello*, 2 AD3d 643, 645, 769 N.Y.S.2d 285 (2d Dept. 2003) (collecting authorities), the court observes that, in every on-line publication and tax form addressed to the subject in the Department's web-site, the Cayugas are recognized as an exempt organization but having no "qualified reservation":

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> Sales to members of recognized Indian nations or tribes are not subject to sales tax, provided that delivery is made to the member of the qualified nation or tribe on a qualified reservation. The qualified reservations are Allegany, Cattaraugus, Oil Spring, Oneida, Onondaga, Poospatuck, St. Regis Mohawk (Akwesasne), Shinnecock, Tonawanda, and Tuscarora.

New York State Dept. of Taxation and Finance, *A Guide to Sales Tax in New York* at 31 (Publication No.750) (2/08). *See also*, to the same effect, *A Guide to Sales Tax for Drugstores and Pharmacies* at 20 (Publication # 840) (8/98); *Instructions* for Form FT-946/1046, Part D ("Qualified Reservations in New York State"); *Certificate of Tax Exemption for a Qualified Indian Nation or Tribe on Purchases of Motor Fuel, Diesel Motor Fuel, and Cigarettes*, FT-939 (7/03) (backside) (containing the same listing); Form DTF-801 (4/96) (backside) (containing the same listing); Form TP-156.9 (8/82) (same listing); *Sales Tax Treatment of Sales Made on Indian Reservations*, TSB-M-83 (18)s (July 12, 1983) (same listing); *Taxable Status of Sales to Indians*, TSB-M-82 (19)s (August 20, 1982) (same listing). Accordingly, by the time §§ 470(16) and 471-e were enacted employing the concept of "qualified reservation," the term had an established meaning in the regulations of the Dept. of Taxation and Finance. Cf., *Abraham & Straus v. Tully*, 47 NY2d 207, 214, 391 N.E.2d 964, 417 N.Y.S.2d 881 (1979); *Matter of Lockport Union-Sun & Journal v. Preisch*, 7 AD2d 502, 507-508, 184 N.Y.S.2d 504 (4th

Dept. 1959), *revd. on other gr.*, 8 NY2d 54, 167 N.E.2d 839, 201 N.Y.S.2d 505 (1960). For all the above reasons, I reject plaintiff's contentions drawn from state law that the sales in question here occurred on a "qualified reservation."

Assuming, however, that the legislative definition of "qualified reservation" in §470(16)(a) sweeps in more than contemplated under 20 N.Y.C.R.R. §529.9, the court further rejects plaintiff's effort to find qualified reservation status from the relevant federal authorities. To hold otherwise would for the Cayuga Indian Nation render meaningless the holdings of *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S.Ct. 1478, 161 L. Ed. 2d 386 (2005); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005); and especially *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F.Supp.2d 203 (N.D.NY 2005). In each of these cases, it was held that plaintiff's "re-unification theory" of title as between "aboriginal title" and newly acquired titles on the "open market" of parcels long publicly held, could not be sustained. *City of Sherrill*, 544 U.S. at 213, 213-14, 125 S.Ct. at 1489, 1489-90:

> In this action, OIN seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject the unification

> theory of OIN ['unified fee and aboriginal title'] . . . and hold that 'standards of Federal Indian Law and Federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

And in *Cayuga Indian Nation of New York v. Pataki*, 413 F3d at 273:

> *Sherrill* concerned claims by the Oneida Indian Nation, another of the Six Iroquois Nations, that its "acquisition of fee title to discrete parcels of historic reservation land revived the Oneida's ancient sovereignty piecemeal over each parcel" and that, consequently, the Tribe need not pay taxes to the City of Sherrill [quoting *Sherrill*, 125 S.Ct. at 1483]. The Supreme Court rejected this claim, concluding that "The Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." [quoting *Sherrill*, 125 S.Ct. at 1483].

The Second Circuit applied this holding "more generally" to the discrete claims of the Cayugas in that case. *Pataki*, 413 F3d at 274, 277. Those claims concern the very land the Cayugas conveyed to the State of New York out of their "Original Reservation" set forth in the 1789 Treaty, in the 1789 Treaty conveyance itself, in the 1795 Treaty, and in the 1807 conveyance. *See id.* 413 F.3d at 268-69 (describing the history of those transactions).

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Finally, in *Cayuga Indian Nation v. Village of Union Springs, supra*, the Cayuga Indian Nation's claim to land in Union Springs was rejected on similar reasoning.[2] After these cases, and in particular the *Village of Union Springs* case, plaintiff's current claim that their convenience stores in Seneca and Cayuga Counties are situate on "qualified reservation" land such that they have sovereign immunity from local taxation in general, or from an abstract application of §471 in particular, cannot be sustained. A fortiori, plaintiff can claim no sovereign or other immunity from application of Tax Law § 1814 on these convenience store parcels.

Plaintiff also contends that these two parcels, once situate within the boundaries of the "Original Reservation" recognized in the 1789 Treaty, *Pataki*, 413 F3d at 268, have never been disestablished by an Act of Congress within the meaning of the "Nonintercourse Act," now codified as 25 U.S.C. § 177. The Supreme Court has declined to decide whether the 1838 Treaty of Buffalo Creek, 7 Stat. 550, disestablished the Oneida Indian Reservation, *City of Sherrill*, 544 U.S. at 216 n.10, 125 S.Ct. at 1491 n.10, and the Second Circuit

2. Plaintiff relies on an earlier opinion in this case (317 F. Supp.2d 128, 143), and neglected to reveal (in its initial motion papers) that the case was vacated for reconsideration in light of *City of Sherrill* by the Second Circuit on May 23, 2005, and, after *Pataki* was decided a month later, ultimately resulted in a dismissal of the Cayuga Indian Nation's complaint on the same ground as animated *City of Sherrill* and *Pataki*, *Village of Union Springs*, 390 F. Supp.2d at 205, 206, i.e., rejection of the reunification theory of reservation title.

similarly declined to reach the same question in connection with the claims of the Cayuga Indian Nation. *Pataki*, 413 F.3d at 269 n.2. Yet the holdings in these cases compelled the result reached in *Village of Union Springs* quite without regard to the Cayuga Indian Nations' contention in regard to the need for Congressional disestablishment, and therefore the court does not in this case reach that question. *See also, State of New York v. The Shinnecock Indian Nation*, 523 F.Supp.2d 185, 290-91 (E.D.NY 2008); *The Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, New York*, 233 F.R.D. 278, 279, 281-82 (N.D.NY 2006) (dismissing action seeking a declaration that the property is "Indian country" within the definition of 18 U.S.C. §1151(a) and that the Tribe has sovereign jurisdiction of the property).

To hold otherwise would be to sanction precisely the result the Supreme Court rejected in *City of Sherrill*. In that case, as in this one, granting the relief demanded by the Indian Nation would upset New York's long exercised sovereignty over the area, create a "checkerboard of alternating state and tribal jurisdiction in New York State — created unilaterally at . . . [the Nation]'s behest — would seriously burde[n] the administration of state and local governments' and would adversely affect landowners neighboring the tribal patches." *City of Sherrill*, 544 U.S. at 219-20, 125 S. Ct. at 1493. The result sought by the Cayuga Nation in this case unquestionably would create the same conditions, and therefore it is unnecessary to determine whether the 1838 Treaty of Buffalo Creek disestablished

a Cayuga reservation or even whether the original Cayuga reservation was ever recognized in the Treaty of Canandaigua or by Congress, questions sharply disputed and now presented to the Second Circuit in *OIN of New York v. Madision County and Oneida County, New York*, No. 05-5458-CV(L), 06-5168-CV(CON), 06-5515-CV(CON), *on appeal from* 401 F.Supp.2d 219 (N.D.NY 2005), *and* 432 F.Supp.2d 285 (N.D.NY 2006). If the Supreme Court could make its determination that OIN exercised no sovereignty over the parcels it had recently obtained on the open market and that the land was subject to taxation, without reaching the disestablishment issue, the court in this case can reach the same result to the extent it needs to look to federal law to resolve plaintiff's claims.[3]

3. Assuming that the Cayugas had a recognized reservation in the late 18th century that was not disestablished by an act of Congress or otherwise by federally approved alienation, courts have held that the Nonintercourse Act is not applicable to modern land purchases by the Indians of land previously approved for alienation. In *Bates v. Clark*, 95 U.S. 204, 24 L. Ed. 471 (1877), the Supreme Court observed "that all country described by the act of 1834 [Indian Trade and Intercourse Act] as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title." *Id.* 95 U.S. at 209. "[N]o court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable." *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1359 (9th Cir. 1993). On the other hand, the Nonintercourse Act would presumably be applicable to modern land purchases by Indians of recognized reservation

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land not disestablished, diminished, or released to alienation by Congress, as plaintiff contends in this case. Because the Supreme Court in *City of Sherrill* declined to reach whether the land in question was of the latter variety even in the face of the 1948 redefinition of "Indian country" in 18 U.S.C. §1151(a) (decoupling title from sovereign status), the court rejects plaintiff's reliance on *Oneida Indian Nation of New York v. Madision County*, 401 F. Supp.2d 219 (N.D.NY 2005) and *Oneida Indian Nation of New York v. Oneida County*, 432 F.Supp.2d 285 (N.D.NY 2006), both on appeal to the Second Circuit, *supra*, as fundamentally inconsistent with the core holding in *City of Sherrill* and in particular the declaration therein that OIN "cannot unilaterally revive ancient sovereignty, in whole or in part, over the parcels at issue." *City of Sherrill*, 544 U.S. at 202-03, 125 S.Ct. at 1483. As the district court held in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin*, 542 F.Supp. 2d 908 (E.D. Wis. 2008), which disagreed with the two cited Northern District cases now on appeal in the Second Circuit on the question of disestablishment and alienability, "[u]nless a state or local government is able to foreclose on Indian property for a non-payment of taxes, the authority to tax such property is meaningless, and the court's analysis in *Yakima*, *Cass County*, and *Sherrill* amounts to nothing more than an elaborate academic parlor game." *Id.* 542 F.Supp.2d at 921. Similarly, in this case, disestablishment is beside the point, for the simple reason that plaintiff cannot revive sovereignty "in whole or in part" under *City of Sherrill* on parcels recently acquired on the open market which have remained subject to state and local regulation for nearly two centuries. To apply the phrase "qualified reservation" in §471-e to the patchwork of parcels recently acquired by the Cayuga Indian Nation, or to make the application of that phrase in our tax statutes dependant on the ultimate resolution of plaintiff's

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Appendix C

Non-cooperation of the State Tax Department

Plaintiff places great reliance on the refusal of the State Department of Taxation and Finance to assist the defendant district attorneys in their criminal investigation or otherwise to take action at the administrative level against the targeted store owners. Plaintiff refers to an advisory opinion of the Commissioner TSB-A-06(2)M (Petition No. M060316A) (March 16, 2006) in which the Department adhered to its "long-standing policy of allowing untaxed cigarettes to be sold from licensed stamping agents to recognized Indian Nations and *reservation-based* retailers making sales from qualified Indian reservations." (emphasis applied). The Commissioner opined that the enactment of §471-e would not change this policy of forbearance until several "issues are fully addressed and considered." Significantly, the question addressed by the opinion was not whether the Commissioner had the power to require Indian retailers, on recognized reservations, to collect and remit sales, use and excise taxes on sales to non-

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disestablishment argument, would create the very chaos *City of Sherrill* was designed to prevent, and without any clear state legislative direction that this should be done in favor of the Cayugas. As set forth above, the concept of "qualified reservation" had established meaning in the Tax Department's duly promulgated regulations by the time it was recently incorporated into the Tax Law §§ 282(20), (21); 284-e; 470(8), (14)-(17); 471-e; and 1112. Plaintiff presents no evidence of legislative intent to the contrary, and the plain words of §470(16)(a) do not suggest the result plaintiff would have this court order.

Indian customers. As set forth above, the Court of Appeals authoritatively laid that issue to rest in favor of the Commissioner's power in *Snyder v. Wetzler*, 193 AD2d 329, 603 N.Y.S.2d 910 (3d Dept. 1993), *aff'd*, 84 NY2d 941, 644 N.E.2d 1369, 620 N.Y.S.2d 813 (1994). Moreover, as the emphasized portions of the administrative opinion quoted above make clear, it has no application outside the context of cigarette sales on "qualified reservations." Here, for the state law reasons stated above, the sales occurred outside any currently recognized Indian reservation territory.

The Commissioner's policy of forbearance was, much earlier, upheld against an equal protection challenge brought by the state association of convenience stores, *Matter of New York Association of Convenience Stores v. Urbacher*, 92 NY2d 204, 699 N.E.2d 904, 677 N.Y.S.2d 280 (1998), and it was later held that an "indefinite [period of] forbearance" in regard to enforcement was supported by a rational governmental basis founded in the impossibility of state "enforce[ment] without the cooperation of the Indian tribes," *id.* 275 AD2d 520, 522, 712 N.Y.S.2d 220 (3d Dept. 2000), which was not forthcoming. The court explained:

> Because of tribal immunity, the retailer cannot be sued for their failure to collect the taxes in question, and State auditors cannot go on the reservations to examine the retailers' records.

> Additionally, the Department cannot compel the retailers to attend audits off the reservations or compel reproduction of their books and records for the purpose of assessing taxes.

Id. 275 AD2d at 522. The court concluded by crediting the Department's recognition that the feasible method of enforcement, i.e., interdiction via off-reservation seizures of unstamped cigarettes on public highways, upheld on *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161-162, 100 S.Ct. 2069, 2085-86, 65 L. Ed. 2d 10 (1980); *Matter of DeLoronde*, 142 AD2d 90, 92-93, 535 N.Y.S.2d 209 (3d Dept. 1988); *cf.*, *Matter of New York State Dept. of Taxation and Finance v. Bramhall*, 235 AD2d 75, 667 N.Y.S.2d 141 (4th Dept. 1997), proved largely unsuccessful in the past and that it led to "civil unrest, personal injuries and significant interference with public transportation on the State highways," *Urbach*, 275 AD2d at 522-23. A recent unpublished Second Circuit decision has observed, however, that the Department's policy of forbearance would not extend to "massive quantities of cigarettes . . . purchased on reservations by non-Native Americans for resale." *United States v. Kaid*, 241 Fed. Appx. 747, 750 (2d Cir. Sept. 12, 2007). *See also*, *U.S. v. Morrison*, 521 F.Supp.2d 246, 249-51 (E.D.NY 2007).

The common denominator in these administrative opinions and court cases is the fact that they all concern sales of cigarettes on recognized or qualified

reservations. Here, by contrast, the sales occurred on ancestral or aboriginal land of the Cayugas, but for reasons stated above not on sovereign or qualified Indian reservations within the meaning of Tax Law §470(16), §471-e, or "Indian country" within the meaning of 18 U.S.C. §1151(a), as authoritatively interpreted in *City of Sherrill*, *Pataki*, and *Village of Union Springs*. Accordingly, because the Department's policy of forbearance has no application to cigarette sales on non-reservation lands, and in any event the forbearance concerns only the particular collection mechanisms created by §471-e, not §471's imposition of tax liability itself, the Commissioner's refusal to aid defendants in their criminal investigation cannot support plaintiff's position.

Another important observation must be made. The discretionary considerations which animate the Tax Department's policy of forbearance under Tax Law §471-e cannot dictate or circumscribe the exercise of discretion vouchsafed by statute to other governmental actors, here the elected district attorneys in Seneca and Cayuga counties, under County Law §700 to determine whether criminal charges should be brought under plainly applicable penal statutes such as Tax Law §1814.[4]

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4. As well stated:

> The clear language of § 471(1) imposes a "tax on all cigarettes possessed in the state" except those cigarettes the state lacks the power to tax. Section 471(2) goes on to require that stamping agents

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> "purchase stamps and affix such stamps in the matter prescribed to packages of cigarettes to be sold within the state." The plain, mandatory phrasing of the statute sets forth a requirement that stamping agents affix tax stamps to all cigarettes the state has the power to tax, which includes those sold by reservation retailers for re-sale to the public. *See Dep't of Taxation & Fin. of NY v. Milhelm Attea & Bros., Inc.*, 512 U.S. at 61, 114 S.Ct. 2028. In reaching this conclusion, the Court follows "[t]he preeminent canon of statutory interpretation" which requires a court to "presume that the legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S.Ct. 1587, 158 L.Ed.2d 338 (2004) (citation omitted).

City of New York v. Milhelm Attea & Bros., Inc., 550 F.Supp.2d 332, 346 (E.D.NY 2008). Furthermore,

> The Court recognizes that the Department has publicly articulated a forbearance policy on the collection of taxes from the sale of cigarettes by stamping agents to reservation retailers, and that a New York State court has upheld the rationality of that policy. *See In re of New York Assoc. of Convenience Stores v. Urbach*, 275 AD2d 520, 522, 712 N.Y.S.2d 220, 222 (N.Y.App.Div. 2000). However, an enforcement decision by the Department does not serve to obviate state legislation.

Id. 550 F.Supp.2d at 347. Nor is there any indication that the forbearance policy extends to non-reservation sales to the public, despite the department's refusal to aid defendants' investigation.

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District Attorneys "have plenary prosecutorial power in the counties where they are elected." *People v. Romero*, 91 NY2d 750, 754, 698 N.E.2d 424, 675 N.Y.S.2d 588 (1998). None of the provisions of the Tax Law which confer on the Attorney General concurrent jurisdiction to prosecute crimes within the counties, *People v. Romero*, 91 NY2d at 757-58 (Tax Law §512, §691, and §1091), authorizes anyone other than the elected district attorney defendants to bring a state prosecution under §1814. By parity of reasoning, and contrary to plaintiff's contention, the Commissioner's letter to the defendant district attorneys in this case reveals a careful effort not to encroach upon the plenary powers of the defendants under County Law §700. Moreover, a determination by this court in plaintiff's favor would constitute a wholly unauthorized usurpation of the district attorney's discretionary power to determine whether these off-reservation sales of un-taxed cigarettes should be prosecuted under Tax Law § 1814.

Appendix C

Conclusion

For the foregoing reasons, the court finds that plaintiff has not established a likelihood of success on the merits of their claims which are cognizable in this declaratory proceeding (*see* above), that irreparable harm has not been shown, and that the balance of equities tips in favor of defendants. The motion for a preliminary injunction is in all respects denied. Summary judgment is granted declaring that §471-e does not exclusively govern the imposition of sales and excise taxes on cigarettes sold from these two parcels, that *Day Wholesale* does not invalidate or interdict prosecutions under §471 and §1814, that plaintiff is not in this proceeding entitled to challenge the manner of search at the Cayuga County Union Springs store, and that plaintiff may not in this proceeding obtain a return of the property.

SO ORDERED.

s/ Kenneth R. Fisher
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December 9, 2008
Rochester, New York

APPENDIX D — NEW YORK TAX LAW § 470(16)

"Qualified reservation."

(a) Lands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state;

(b) Lands within the state over which an Indian nation or tribe exercises governmental power and that are either (i) held by the Indian nation or tribe subject to restrictions by the United States against alienation, or (ii) held in trust by the United States for the benefit of such Indian nation or tribe;

(c) Lands held by the Shinnecock Tribe or the Poospatuck (Unkechauge) Nation within their respective reservations; or

(d) Any land that falls within paragraph (a) or (b) of this subdivision, and which may be sold and replaced with other land in accordance with an Indian nation's or tribe's land claims settlement agreement with the state of New York, shall nevertheless be deemed to be subject to restriction by the United States against alienation.

APPENDIX E — FEBRUARY 25, 1789 TREATY BETWEEN THE CAYUGAS AND NEW YORK STATE

STATE TREATY WITH THE CAYUGAS, 1789

At a treaty held in the City of Albany in the State of New York, by his excellency George Clinton, Esquire, Governor of the said State, the Honorable Pierre Van Cortlandt, Esquire Lieutenant Governor of the said State, Ezra L'Hommidieu, Abram Ten Broeck, John Hathorn, Samuel Jones, Peter Gansevoort Junr., and Egbert Benson, Esquires, commissioners authorized for that purpose by and on behalf of the people of the State of New York with several of the Sachems — Chiefs and Warriors of the Tribe or Nation of Indians called the Cayugas, for and on behalf of the said Nation, it is on the twenty-fifth day of February, in the year of our Lord one thousand seven hundred and eighty-nine, covenanted and concluded as follows:

First. The Cayugas do cede and grant all their lands to the People of the State of New York forever.

Secondly. The Cayugas shall of the ceded lands hold to themselves and to their posterity forever, for their own use and cultivation but not to be sold, leased or in any other manner aliened or disposed of to others, All that tract of land beginning at the Cayuga Salt Spring on the Seneca River and running thence southerly to intersect the middle of a line to be drawn from the outlet of Cayuga to the outlet of Waskongh Lake and from the said place of intersection southerly the general course of the eastern bank of the Cayuga Lake, thence westerly

to intersect a line running on the west side of the Cayuga Lake at the mean distance of three miles from the western branch thereof; and from the said point of intersection along the said line so running on the west side of the Cayuga Lake to the Seneca River, thence down the said river to the Cayuga Lake, thence through the said Lake to the outlet thereof, thence farther down the said river to the place of beginning, so as to comprehend within the limits aforesaid and exclusive of the water of Cayuga Lake the quantity one hundred square miles; also the place in the Seneca River at or near a place called Skayes, where the Cayugas have heretofore taken eel, and a competent piece of land on the southern side of the river at the said place sufficient for the said Cayugas to land and encamp on and to cure their eel, excepted nevertheless out the said lands or reserved one mile square at the Cayuga Ferry.

We the said Cayugas do hereby acknowledge to have received from the People of the State of New York the sum of five hundred dollars in Silver being the annual payment Stipulated to be made to us the said Cayugas on the first day of June instant in and by certain articles of Agreement or Deeds of Cession hereunto annexed and executed at the City of Albany by and between the People of the said State by their Commissioners authorized for that purpose and several of the said Cayugas for and in behalf of the said Tribe or Nation and bearing date the twenty fifth day of February in the year one thousand seven hundred and eighty nine. And also the further sum of one thousand dollars as a Benevolence : And We the said Cayugas in Consideration

thereof Do by these presents fully freely and absolutely ratify and confirm the said agreement and cession and all and singular the Articles Covenants Matters and things therein expressed and contained on the part of us the said Cayugas done or to be done executed or performed and We the said Cayugas do further hereby Grant and release to the people of the State of New York all our Right Interest and Claim in and to all lands lying East of the Line of Cession by the State of New York to the Commonwealth of Massachusetts, except the Lands mentioned in the said Deed of Cession hereunto annexed to be reserved to us the Cayugas and our Posterity.

* * * *

APPENDIX F — 1794 TREATY OF CANANDAIGUA, 7 STAT. 44

TREATY OF CANANDAIGUA

Preamble of the Canandaigua Treaty

A Treaty Between the United States of America and the Tribes of Indians Called the Six Nations:

The President of the United States having determined to hold a conference with the Six Nations of Indians for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the sachems and warriors of the Six Nations in general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations. . . .

ARTICLE 1. Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

ARTICLE 2. The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them, or either of the Six Nations, nor their Indian

friends, residing thereon, and united with them in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

ARTICLE 3. The land of the Seneca Nation is bounded as follows: beginning on Lake Ontario, at the northwest corner of the land they sold to Oliver Phelps; the line runs westerly along the lake, as far as Oyongwongyeh Creek, at Johnson's Landing Place, about four miles eastward, from the fort of Niagara; then southerly, up that creek to its main fork, continuing the same straight course, to that river; (this line, from the mouth of Oyongwongyeh Creek, to the river Niagara, above Fort Schlosser, being the eastern boundry of a strip of land, extending from the same line to Niagara River, which the Seneca Nation ceded to the King of Great Britain, at the treaty held about thirty years ago, with Sir William Johnson;) then the line runs along the Niagara River to Lake Erie, to the northwest corner of a triangular piece of land, which the United States conveyed to the State of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that State; then due east to the southwest corner of the land sold by the Seneca Nation to Oliver Phelps; and then north and northerly, along Phelps' line, to the place of beginning, on the Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneca Nation; and the United States will never claim the same, nor

disturb the Seneca Nation, nor any of the Six Nations, or of their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same, to the people of the United States, who have the right to purchase.

ARTICLE 4. The United States have thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senecas, and engaged never to claim the same, not disturb them, or any of the Six Nations, or their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; now, the Six Nations, and each of them, hereby engage that they will never claim any other lands, within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE 5. The Seneca Nation, all others of the Six Nations concurring cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffalo Creek; and the people of the United States shall have the free and undisturbed use of this road for the purposes of traveling and transportation. And the Six Nations and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes, where necessary, for their safety.

Appendix F

ARTICLE 6. In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established strong and perpetual, the United States now deliver to the Six Nations, and the Indians of the other nations residing among them, a quantity of goods, of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars heretofore allowed to them by an article ratified by the President, on the twenty-third day of April, 1792, making in the whole four thousand five hundred dollars; which shall be expended yearly, forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils, suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated, to be made by the superintendent, appointed by the President, for the affairs of the Six Nations, and their Indian friends aforesaid.

ARTICLE 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and the Six Nations agree, that for injuries done by individuals, on either side, no private revenge or retaliation shall take place;

but, instead thereof, complaint shall be made by the party injured, to the other; by the Six Nations or any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the Nation to which the offender belongs; and such prudent measures shall then be pursued, as shall be necessary to preserve or peace and friendship unbroken, until the Legislature (or Great Council) of the United States shall make other equitable provision for that purpose.

NOTE: It is clearly understood by the parties to this treaty, that the annuity, stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations, and of their Indian friends united with them, as aforesaid, as do or shall reside within the boundaries of the United States; for the United States do not interfere with nations, tribes or families of Indians, elsewhere resident.

IN WITNESS WHEREOF, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereunto set their hands and seals.

Done at Canandaigua, in the State of New York, in the eleventh day of November, in the year one thousand seven hundred and ninety-four.

TIMOTHY PICKERING

Appendix F

Witnesses	Interpreters
Israel Chapin	Horatio Jones
Wm. Shepard Jun'r	Joseph Smith
James Smedley	Jasper Parrish
John Wickham	Henry Abeele
Augustus Porter	
James H. Garnsey	
Wm. Ewing	
Israel Chapin, Jun'r	

(Signed by fifty-nine Sachems and War Chiefs of the Six Nations.)

APPENDIX G — JULY 27, 1795 TREATY BETWEEN THE CAYUGAS AND NEW YORK STATE

At a Treaty held at the Cayuga Ferry in the State of New York by Philip Schuyler, John Cantine, David Brooks and John Richardson Agents authorized for that purpose by and on behalf of the People of the State of New York with the tribe or nation of Indians called the Cayugas, it is on this twenty seventh day of July one thousand seven hundred and ninety five covenanted concluded and agreed upon as follows,

Whereas there was reserved to the Cayuga Nation by the articles of agreement made at Albany on the twenty fifth day of February one thousand seven hundred and eighty-eight and confirmed by subsequent articles made at Fort Stanwix on the twenty second day of June one thousand seven hundred and ninety sundry lands in the said Articles particularly specified and described.

Now Know all Men that in order to render the said reservations more productive of annual income to the said Cayuga nation, (it is Covenanted, stipulated and agreed by the said Cayuga Nation that they will sell and they do by these presents sell to the People of the State of New York all and singular the Lands reserved to the use of the said Cayuga Nation) in and by the hereinbefore mentioned articles of Agreement that is to say as well the Lands bordering on and adjacent to the Cayuga Lake Commonly called the Cayuga reservation as the Lands at Secawyace and elsewhere heretofore or now appertaining to the said Nation

(except the Lands hereinafter particularly excepted and still to be reserved to the said Nation or the individual Sachem Fish Carrier) to have and to hold the same to the People of the State of New York and to their Successors forever,—

* * *

Fourthly the People of the State of New York reserve to the Cayuga Nation and to their posterity forever for their own use and Occupation but not to be Sold Leased or in any other manner aliened or disposed of to others unless by the express Consent of the Legislature of the said State A Certain Tract of Land part of the reservation aforesaid of two miles square at such place as the same shall be run out and marked by a Surveyor appointed by the said Agents on the part of the People of this State together with such of the said Indians as shall attend for that purpose and also one other piece of land of one mile square part of the reservation aforesaid and the Mine within the same if say there be under the same restrictions and to be run out and marked in manner aforesaid, and also one other piece of Land one mile square at Cannogal for the use of an Indian Sachem of the said Nation called Fish Carrier and for the use of his posterity forever under the restrictions aforesaid which said last piece of land shall be leased by the People of the State of New York for such term and on such Conditions as the Legislature thereof shall direct and the money annually arising therefrom shall be paid unto the said Fish Carrier or his posterity at Canadaghque by the said Agent or by

such person as the Governor of this State shall thereunto appoint and unto such person as shall produce a Certain Writing Subscribed by the said Agents and Sealed with their Seals taking and recording the receipts therefor in the manner aforesaid—

* * * *

In Testimony whereof as well the Sachems, Chief Warriors and others of the said Cayugas in behalf of their tribe or Nation as the said Agents on behalf of the People of the State of New York have hereunto interchangeably set their hands and affixed their Seals the day and year first above written.

* * * *

APPENDIX H — MAY 30, 1807 TREATY BETWEEN THE CAYUGAS AND NEW YORK STATE

To all People to whom these presents shall come Greeting Know Ye that on the twenty seventh day of July in the year One thousand seven hundred and Ninety five The People of the State of New York did reserve to the Cayuga Nation of Indians, and to their own use and occupation but not to be sold leased or in any other manner aliened or disposed of to others unless by the express consent of the Legislature of the said State a certain Tract of Land part of the reservation theretofore reserved to them of Two Miles Square at such place as the same shall be run out and marked by a Surveyor appointed by agents on the part of the people of this State together with such of the said Indians as shall attend for that purpose. And also one other piece of land of one mile square part of the reservation aforesaid and the mine within the same if any there be under the same restrictions and to be run out and marked in manner aforesaid. And

Whereas The said two tracts of land have been laid out and surveyed in manner aforesaid and occupied by the said Cayuga Nation. And

Whereas The said Cayuga Nation of Indians have signified their desire to remove from the said lands and to dispose of their Interest therein to the people of this State for the sum of four thousand eight hundred dollars which sum the Legislature have agreed to pay the said Cayuga Nation for their interest in the said two Reservations of Land.

Appendix II

Now know ye that the said Cayuga Nation for and in consideration of the sum of Four thousand eight hundred dollars to them in hand by the People of the State of New York at Canadarqua have sold and released and by these presents Do sell and release to the people of the State aforesaid all their right title Interest possession property claim and demand whatsoever of in and to the said two tracts of Land laid out and Surveyed as aforesaid on the east side of Cayuga Lake commonly called the Cayuga Reservations the said tract being two miles square and the other Tract being One mile square — which two reservations contain all the land the said Cayuga Nation claim or have any interest in in this State To have and to hold the said Two tracts of Land as above described unto the People of the State of New York and their Successors forever.

In Witness whereof the Chief Sachems and Warriors of the said Cayuga Nation have hereunto set their hands and Seals this thirtieth day of May in the year of our Lord One thousand eight hundred and Seven

APPENDIX I —
TREATY OF BUFFALO CREEK
(7 STAT. 550, JAN. 15, 1838)

* * *

GENERAL PROVISIONS.

ARTICLE 1. The several tribes of New York Indians, the names of whose chiefs, head men, warriors and representatives are hereunto annexed, in consideration of the premises above recited, and the covenants hereinafter contained, to be performed on the part of the United States, hereby cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831, excepting the following tract, on which a part of the New York Indians now reside: beginning at the southwesterly corner of the French grants at Green Bay, and running thence southwardly to a point on a line to be run from the Little Cocaclin, parallel to a line of the French grants and six miles from Fox River; from thence on said parallel line, northwardly six miles; from thence eastwardly to a point on the northeast line of the Indian lands, and being at right angles to the same.

ARTICLE 2. In consideration of the above cession and relinquishment, on the part of the tribes of the New York Indians, and in order to manifest the deep interest of the United States in the future peace and prosperity of the New York Indians, the United States agree to set apart the following tract of country, situated directly west of the State of Missouri, as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United

States, who have no permanent homes, which said country is described as follows, to wit: Beginning on the west line of the State of Missouri, at the northeast corner of the Cherokee tract, and running thence north along the west line of the State of Missouri twenty-seven miles to the southerly line of the Miami lands; thence west so far as shall be necessary, by running a line at right angles, and parallel to the west line aforesaid, to the Osage lands, and thence easterly along the Osage and Cherokee lands to the place of beginning to include one million eight hundred and twenty-four thousand acres of land, being three hundred and twenty acres for each soul of said Indians as their numbers are at present computed. To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act, entitled "An act to provide for an exchange of lands, with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi," approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said lands among the different tribes, nations, or bands, in severalty, with the right to sell and convey to and from each other, under such laws and regulations as may be adopted by the respective tribes, acting by themselves, or by a general council of the said New York Indians, acting for all the tribes collectively. It is understood and agreed that the above described country is intended as a future home for the following tribes, to wit: The Senecas, Onondagas, Cayugas, Tuscarora, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns residing in the State of

New York, and the same is to be divided equally among them, according to their respective numbers, as mentioned in a schedule hereunto annexed.

ARTICLE 3. It is further agreed that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States.

ARTICLE 4. Perpetual peace and friendship shall exist between the United States and the New York Indians; and the United States hereby guaranty to protect and defend them in the peaceable possession and enjoyment of their new homes, and hereby secure to them, in said country, the right to establish their own form of government, appoint their own officers, and administer their own laws; subject, however, to the legislation of the Congress of the United States, regulating trade and intercourse with the Indians. The lands secured to them by patent under this treaty shall never be included in any State or Territory of this Union. The said Indians shall also be entitled, in all respects, to the same political and civil rights and privileges, that are granted and secured by the United States to any of the several tribes of emigrant Indians settled in the Indian Territory.

ARTICLE 5. The Oneidas are to have their lands in the Indian Territory, in the tract set apart for the New York Indians, adjoining the Osage tract, and that hereinafter set apart for the Senecas; and the same shall be so laid off as to secure them a sufficient quantity of timber for their use. Those tribes, whose lands are not specially designated in this treaty, are to have such as shall be set apart by the President.

ARTICLE 6. It is further agreed that the United States will pay to those who remove west, at their new homes, all such annuities, as shall properly belong to them. The schedules hereunto annexed shall be deemed and taken as a part of this treaty.

ARTICLE 7. It is expressly understood and agreed, that this treaty must be approved by the President and ratified and confirmed by the Senate of the United States, before it shall be binding upon the parties to it. It is further expressly understood and agreed that the rejection, by the President and Senate, of the provisions thereof, applicable to one tribe, or distinct branch of a tribe, shall not be construed to invalidate as to others, but as to them it shall be binding, and remain in full force and effect.

ARTICLE 8. It is stipulated and agreed that the accounts of the Commissioner, and expenses incurred by him in holding a council with the New York Indians, and concluding treaties at Green Bay and Duck Creek, in Wisconsin, and in the State of New York, in 1836, and those for the exploring party of the New York Indians, in 1837, and also the expenses of the present treaty, shall be allowed and settled according to former precedents.

* * *

Appendix I

SPECIAL PROVISIONS FOR THE SENECAS.

ARTICLE 10. It is agreed with the Senecas that they shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians, and to extend so far west, as to include one half-section (three hundred and twenty acres) of land for each soul of the Senecas, Cayugas and Onandagas, residing among them; and if, on removing west, they find there is not sufficient timber on this tract for their use, then the President shall add thereto timber land sufficient for their accommodation, and they agree to remove; to remove from the State of New York to their new homes within five years, and to continue to reside there. And whereas at the making of this treaty, Thomas L. Ogden and Joseph Fellows the assignees of the State of Massachusetts, have purchased of the Seneca nation of Indians, in the presence and with the approbation of the United States Commissioner, appointed by the United States to hold said treaty, or convention, all the right, title, interest, and claim of the said Seneca nation, to certain lands, by a deed of conveyance a duplicate of which is hereunto annexed; and whereas the consideration money mentioned in said deed, amounting to two hundred and two thousand dollars, belongs to the Seneca nation, and the said nation agrees that the said sum of money shall be paid to the United States, and the United States agree to receive the same, to be disposed of as follows : the sum of one hundred thousand dollars is to be invested by the President of the United States in safe stocks, for their use, the income of which

is to be paid to them at their new homes, annually, and the balance, being the sum of one hundred and two thousand dollars, is to be paid to the owners of the improvements on the lands so deeded, according to an appraisement of said improvements and a distribution and award of said sum of money among the owners of said improvements, to be made by appraisers, hereafter to be appointed by the Seneca nation, in the presence of a United States Commissioner, hereafter to be appointed, to be paid by the United States to the individuals who are entitled to the same, according to said apprisal and award, on their severally relinquishing their respective possessions to the said Ogden and Fellows.

SPECIAL PROVISIONS FOR THE CAYUGAS.

ARTICLE 11. The United States will set apart for the Cayugas, on their removing to their new homes at the west, two thousand dollars, and will invest the same in some safe stocks, the income of which shall be paid them annually, at their new homes. The United States further agree to pay to the said nation, on their removal west, two thousand five hundred dollars, to be disposed as the chiefs shall deem just and equitable.

APPENDIX J — 1793 INDIAN TRADE AND INTERCOURSE ACT

* * *

SEC. 8. *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

* * *

SEC. 13. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Irdians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

* * * *

APPENDIX K — 1802 INDIAN TRADE AND INTERCOURSE ACT

* * *

SEC. 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution : and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months : *Provided nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

* * *

SEC. 19. *And, be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the

individual states; or the unmolested use of a road from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair the said road, under the direction or orders of the governor of said state, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement, or to the settlement on Obed's river, (so called,) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said traces, or either of them, as the case may be, after which, the penalties of this act shall be incurred by every person traveling or being found on said traces, or either of them, to which the prohibition may apply, within the Indian boundary, without a passport.

* * * *

APPENDIX L — NONINTERCOURSE ACT, 25 U.S.C. § 177 (1834)

* * *

SEC. 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution.

* * * *

APPENDIX M — U.S. CONSTITUTION, AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U.S.
FILED
AUG 27 2010
OFFICE OF THE CLERK

No. 10-206

IN THE
Supreme Court of the United States

DAVID S. GOULD, SHERIFF, CAYUGA COUNTY, NEW YORK, ET AL.,
PETITIONERS,

v.

CAYUGA INDIAN NATION OF NEW YORK,
RESPONDENT.

On Petition for a Writ of Certiorari to the Court of Appeals of New York

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the decision of the Court of Appeals of New York that Respondent Cayuga Indian Nation of New York has a "qualified reservation" within the meaning of New York Tax Law § 470(16) rests upon a determination of state law and therefore not suitable for review by this Court.

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Brief of United States as *Amicus Curiae* in Support of Respondent, *Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233 (N.Y. 2010) (No. 74) 10

STATEMENT OF THE CASE

This case rests upon a determination of state law that is inappropriate for review by this Court and that would not warrant review in any event. Petitioners challenge the ruling of the New York Court of Appeals that Respondent Cayuga Indian Nation of New York ("Cayuga Nation" or "Nation") has a "qualified reservation" within the meaning of New York Tax Law § 470(16). But although the Court of Appeals held that the New York Legislature chose to include within the definition of a "qualified reservation" in § 470(16) tribally owned property that has been recognized as a "reservation" by the federal government, the scope of "qualified reservation" in § 470(16) of the state tax law is still a state law issue. For this and other reasons discussed below, the Cayuga Nation respectfully submits that the petition for certiorari should be denied.[1]

The background of this dispute, and the history of New York's treatment of the taxation of cigarette sales made by Indian nations in the State, is set forth at length in the comprehensive opinion of the Court of Appeals. *See* Pet. App. 2a-19a. Respondent will not repeat that background and history here. In a nutshell, the Cayuga Nation (and other Indian nations in the State), in reliance upon express

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[1] In its first question presented, Petitioners seek review of a "4-3 decision" of the Court of Appeals. In fact, the dissenting judges addressed an issue that Petitioners do not even raise. *See* Pet. App. 54a-58a. The dissenting judges did not address whether the Cayuga Nation has a "qualified reservation" within the meaning of the Tax Law.

pronouncements of the New York Department of Revenue and Taxation ("Department"), has made cigarette sales to both tribal members and non-members without collecting New York state excise taxes. At the time of the events in question, the State had not disputed the lawfulness of such sales. However, Petitioners here – local officials in Cayuga and Seneca Counties – seized "unstamped" cigarettes (*i.e.*, cigarettes not bearing New York State tax stamps) from two Cayuga Nation stores. Disclaiming any argument based on federal law immunity, the Nation immediately sought a declaratory judgment that its possession and sale of such cigarettes was lawful as a matter of state tax law. The Counties contended that (1) New York State tax law required Indian nations to collect state taxes on cigarettes sold to non-tribal members, and (2) even if state tax law did *not* require tribes to collect taxes on sales made on a "qualified reservation," the Cayuga Nation has no such reservation. After extensive state court proceedings, the Court of Appeals of New York ultimately ruled that (1) New York State tax law (as it existed at the time in question) did *not* require Indian nations to collect state taxes on any cigarette sales made on a "qualified reservation" to direct consumers, Pet. App. 41a-53a; and (2) the Cayuga Nation has such a "qualified reservation" as defined by New York Tax Law § 470(16), Pet. App. 23a-40a.

REASONS FOR DENYING THE WRIT

This case does not warrant review in this Court for at least four reasons: (1) the decision of the New

York Court of Appeals rests upon a definition of "qualified reservation" that is a matter of state law; (2) the New York Legislature has recently overhauled the tax law requirements governing cigarette sales on such reservations, effectively changing the underlying circumstances that led to the instant dispute; (3) even if this Court were to perceive a still-relevant federal question in this case, Petitioners simply are wrong in contending that the decision of the Court of Appeals rests upon constructs of Indian *sovereignty* or *sovereign* land; and (4) the decision of the Court of Appeals that the Cayuga Nation has a "qualified reservation" as a matter of state tax law because the Nation still has a *reservation* that is recognized by the federal government is plainly correct and consistent with *every* other court to address the issue.

A. The Decision Of The Court Of Appeals Rests On State Law.

In its decision, the Court of Appeals ruled that, at the time of the events in question, New York state law contained no legislative or regulatory scheme that required Indian nations selling cigarettes on a "qualified reservation" to collect state excise taxes on sales made to Indian or non-Indian consumers. Pet. App. 41a-52a.[2] This holding applied, however, only

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[2] The Court noted that, while the appeal was pending, "the Department of Taxation and Finance has announced a change in policy." Pet App. 13a n.6; *see also* Pet. App. 37a n.13. As discussed *infra*, the Legislature and the Department have overhauled both the legislative and regulatory scheme in New

to sales made on a "qualified reservation" as defined by New York Tax Law § 470(16), quoted in full at Pet. App. 24a. *See* Pet. App. 25a (noting that neither party disputed the applicability of § 470(16)); Pet. App. 23a-40a (interpreting and applying § 470(16)). As defined in § 470(16) of the Tax Law, a "qualified reservation" includes, under subsection (a), "Lands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the State." Pet. App. 24a. But "qualified reservation" also includes, under subsection (c) of § 470(16), "Lands held by the Shinnecock Tribe or the Poospatuck (Unkechauge) Nation within their respective reservations." Pet. App. 24a. Significantly, at the time § 470(16) was enacted, both the Shinnecock and the Poospatuck tribes were recognized by New York State, but *not* by the federal government. Pet. App. 26a-27a & n.10. Thus, § 470(16) sets forth a uniquely New York definition of "qualified reservation," reflecting a deliberate choice by the New York Legislature to "borrow" concepts of federal law in some respects but not in others. Pet. App. 26a.

In selling cigarettes without collecting state taxes, the Cayuga Nation relied on § 470(16)(a), quoted above, to maintain that its sales were made on a "qualified reservation" as defined by state law. In interpreting that provision, the Court of Appeals ruled that "when the Legislature used the term 'reservation' in Tax Law § 470(16)(a), it intended to

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York governing sales of cigarettes by Indian nations since the date of the Court of Appeals' decision.

refer to any reservation recognized by the United States government." Pet. App. 25a-26a. And it therefore followed in the case that "[w]hether the [Nation's two convenience store properties] sit on reservation land presents a critical threshold consideration." Pet. App. 23a.

Although state law incorporated concepts of federal law in defining "qualified reservation," the meaning and scope of § 470(16) remains a state law issue. Because state law extended certain privileges to sales made on a "qualified reservation" as defined by § 470(16), there was no need to litigate in the case anything other than the state law meaning of "qualified reservation." The Cayuga Nation did not contend that federal law rendered the Nation's sales immune from state taxation. It was enough that the New York Legislature had chosen to afford "qualified reservation" status to any "reservation" recognized by the federal government, just as the Legislature had chosen to afford "qualified reservation" status to land of the Shinnecock and Poospatuck tribes that were only recognized as a matter of New York state law.

As such, the two Cayuga convenience stores at issue qualified as a "qualified reservation" simply because they were "held by an Indian nation or tribe" and "located within the reservation of that nation or tribe in the state." New York Tax Law § 470(16)(a). As discussed *infra*, and as the Court of Appeals recognized, *every* court to consider the question has ruled that the Cayuga federal treaty "reservation" still exists today because it has never been

disestablished by Congress. Pet. App. 29a-30a. But the critical fact is that this definition of "qualified reservation" in § 470(16)(a) is what the Court of Appeals determined "the Legislature . . . intended." Pet. App. 25a. The meaning of § 470(16)(a) remains a state law issue, despite the Legislature's voluntary decision to "borrow," Pet. App. 26a, a federal construction of the word "reservation" and to include such reservation land (along with other land) in the state tax law definition of "qualified reservation."

B. The State Law Consequences Giving Rise To The Instant Dispute Have Changed.

The instant case arose out of a longstanding dispute in New York regarding sales of cigarettes by Indian nations, recounted at length by the Court of Appeals. Pet. App. 2a-19a. Already at the time of the Court of Appeals decision, however, the Tax Department had "announced a change in policy." Pet. App. 13a n.6. Even more significant, on June 21, 2010, the New York Legislature changed provisions of the Tax Law governing sales of cigarettes by Indian nations, *see* 2010 N.Y. Laws 134, Part D, and on June 22, 2010, the Tax Department issued emergency regulations implementing the new statute, *see* 20 N.Y.C.R.R. § 74.6 (2010). The new statutory and legislative scheme is scheduled to take effect on September 1, 2010.

Although the new statutory and regulatory scheme has been challenged by several Indian nations, including the Cayuga Nation, the instant case arose as the result of an official policy of

"forbearance" of the Tax Department that the Department now has repealed. *See* Pet. App. 6a-11a, 13a n.6. The instant dispute therefore is of limited significance. To be sure, Petitioners still seek to prosecute Cayuga Nation leaders for the Nation's previous possession and sale of unstamped cigarettes, even though the Nation acted in reliance upon the Tax Department's explicit policy of forbearance that existed at the time of those sales. Pet. App. 6a-11a. But the instant case concerns a statutory and regulatory framework that since has been changed. It is of little moment to this Court whether county officials in New York may prosecute leaders of the Cayuga Nation for alleged violations of state tax law that the State itself had refused to pursue, and that the Court of Appeals of New York has ruled would be inconsistent with the court's construction of the then-applicable New York Tax Law. *Even if* the Court of Appeals interpreted the State's tax law incorrectly because it misconstrued federal law that the New York Legislature had chosen to "borrow," Pet. App. 26a, there hardly is a compelling need for this Court to correct that error so that local officials can prosecute leaders of the Cayuga Nation for making the same mistake as the State's highest court.

C. Petitioners Blatantly Mischaracterize The Decision Of The Court Of Appeals.

The thrust of Petitioners' argument is that the Court of Appeals has issued a significant decision that undermines this Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544

U.S. 197 (2005), by affording "sovereign reservation" status to the Cayuga Nation's two parcels of reacquired reservation land. But Petitioners' contentions are belied by a simple reading of the Court of Appeals' decision. *See* Pet. App. 23a-40a. All the Court of Appeals ruled is that the parcels are located on *reservation* land, because that is all that state tax law required. The court was careful *not* to state that its conclusion rested upon any notions of sovereign status. Indeed, the court noted that a *separate* provision of the Tax Law, § 470(16)(b), afforded "qualified reservation" status to parcels of land that have attributes of sovereignty. Pet. App. 35a-36a. In an effort to make this case appear interesting to this Court, Petitioners simply mischaracterize what the case is about.

The decision of the Court of Appeals could not be clearer. As the court emphasized: "In this case, however, the Nation does not suggest that its reacquisition of the convenience store parcels revives its ability to exert full sovereign authority over the property. *Rather than seeking immunity from state tax laws, it is actually relying on state tax laws*: the Nation contends that, under the plain language of Tax Law § 470(16)(a), the property it reacquired constitutes 'qualified reservation' property." Pet. App. 33a (emphasis added). Consistent with that description of the Nation's claim, the court also noted that the "Cayuga Indian Nation acknowledges its obligation to pay real property taxes and comply with local zoning and land use laws on these parcels and

it is undisputed that the Nation has, to date, fulfilled those obligations." Pet. App. 35a n.11.

The Court of Appeals also gave careful and lengthy consideration to this Court's decision in *City of Sherrill*. Pet. App. 31a-37a. Most significant, the court observed that *City of Sherrill* itself suggests that land may retain "reservation" status even if an Indian nation cannot fully exercise sovereign power over it. Pet. App. 35a. And that is precisely the situation here: the Cayuga Nation did *not* assert any sovereign immunity from tax, but simply contended that the land in question remained "reservation" land. As noted below, *every* court to consider the question has agreed that a Cayuga "reservation" still exists because it was never disestablished by Congress. Thus, the New York Legislature's definition of "qualified reservation" in Tax Law § 470(16) – which separately includes "reservation" land in the State, § 470(16)(a); land with attributes of Indian sovereignty in the State, § 470(16)(b); and even certain Shinnecock and Poospatuck land in the State that has *no* status as Indian land under federal law, § 470(16)(c) – included the Cayuga Nation's two parcels as a matter of New York tax law. There is nothing in this case, or in the Court of Appeals' discussion of *City of Sherrill*, that warrants review by this Court.

D. There Is No Reason For This Court To Review Whether The Cayuga Nation Continues To Have A "Reservation."

Lastly, Petitioners contend, in their second question presented, that the Court of Appeals erred

in concluding that the Cayuga Nation still has a "reservation" under this Court's well-settled test for reservation status, independent of what consequences or privileges may flow from "reservation" status. According to Petitioners, the Nation *never* had a reservation – and if it did, that reservation was disestablished by Congress. The point was barely pressed below. But in any event, as the Court of Appeals noted, "[i]t appears that every federal court that has examined whether the Cayuga reservation was disestablished or diminished by Congress has answered that question in the negative." Pet. App. 29a-30a (citing cases); *see also* Pet. App. 33a-34a. Petitioners' argument to the contrary in this Court relies upon a construction of old treaties and historical materials, *see* Pet. 18-28, that not a single court has ever endorsed. The United States filed an *amicus curiae* brief in the Court of Appeals in which it argued and demonstrated that the Cayuga Nation "retains a reservation in New York State that was acknowledged as a federal reservation in the 1794 Treaty of Canandaigua. Only Congress can disestablish the Cayuga reservation, and it has not done so." Brief of United States as *Amicus Curiae* in Support of Respondent at 1, *Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233 (N.Y. 2010) (No. 74). There is no reason for this Court to grant review of that issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAYUGA COUNTY SHERIFF DAVID S. GOULD, SENECA COUNTY SHERIFF JACK S. STENBERG, CAYUGA COUNTY DISTRICT ATTORNEY JON E. BUDELMANN, and SENECA COUNTY DISTRICT ATTORNEY RICHARD E. SWINEHART, PETITIONERS

v.

CAYUGA INDIAN NATION OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR NEW YORK

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION, CITIZENS EQUAL RIGHTS ALLIANCE AND CENTRAL NEW YORK FAIR BUSINESS AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICI CURIAE

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the decision of the New York State Court of Appeals effects the governance of the state, affecting the many CERA members who live in New York. Starting with the amicus curiae briefs in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) and *Carcieri v. Salazar*, 129 S. Ct 1058 (2009). CERF has maintained a consistent position on limiting the Indian Reorganization Act (IRA) to only those tribes occupying actual federal Indian reservations in the Western United States. This brief continues the discussion requiring the repetition of some facts and adds new facts on how the Nixon Indian Policy was actually implemented. See http://www.narf.org/sct/sherrill/amiciequalrightsfoundation.pdf, http://www.narf.org/sct/carcieri/merits/cerf_et_al.pdf and www.narf.org/sct/madisoncountyvoneida/cerf_cera_cnyfb_amica_brief.pdf., Docket No. 10-72.

The Central New York Fair Business Association, Inc. (CNYFBA), incorporated in the State of New York, is headquartered in the City of Oneida. It is the purpose of Fair Business to identify and address significant issues affecting the equality of business opportunity in central New York. The holding that the

Cayuga Indian Nation has a "reservation" in New York will adversely affect all citizens of New York by creating potential checkerboard jurisdiction and constant jurisdictional conflict disrupting the justifiable expectations of every person and small businesses.

Members of CERA, further are resident citizens of Seneca and Cayuga Counties. They are homeowners and business owners in the area where the parcels at suit are located. They share common roads; common underground water aquifer; and common streams. They will be impacted as taxpayers by public costs resulting from any proposed use of the "reservation" not just the continuing cigarette sales. CERA and CNYFBA are also becoming increasingly concerned with state law not applying to Native Americans. This unequal application of law threatens the very nature of our constitutional government.

Seneca and Cayuga Counties and the Cayuga Indian Nation have consented by letter to the filing of this Amici Brief.[1]

SUMMARY OF THE ARGUMENT

The first section of this brief addresses the land status of the former and present state reservation land in New York including a discussion of the Treaty of Buffalo Creek and its effect. This section explains that the New York State Court of Appeals was incorrect to apply *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463

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[1]Pursuant to Rule 37 of the Court, counsel requested consent for the filing of this brief from the parties more than 10 days prior to its due date. None of the parties authored the brief in whole or in part and no one other than *amici* made a monetary contribution to the preparation or submission of this brief.

(1976) to this former reservation of state land. The section concludes by explaining that the Cayuga did not have any remaining state reservation in 1838 as a result of the Treaty of Buffalo Creek and why lands purchased within the extinguished boundaries of the former reservation cannot meet the definition of a "qualified reservation." The second section discusses federal Indian common law and how the decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*) directly interferes with the relinquishment of the United States under the Treaty of Buffalo Creek. It continues with how the "trust relationship" over the Indians as wards becomes a separate basis for interfering with state jurisdiction. This brief concludes by requesting this Court to overrule its prior decisions that allow the Nixon Indian Policy.

ARGUMENT

The New York State Court of Appeals in its 4-3 decision in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010) concluded that as a matter of federal law the Cayuga tribe was acting within its sovereign capacity to sell cigarettes to non-Indians without collecting the state taxes. The highest state court of New York rendered an interpretation of *City of Sherrill* that virtually contradicts this Court's determination that state reservations were created by the Treaty of Fort Schuyler in 1788 before the Constitution of the United States took effect. Like the Second Circuit in the Madison and Oneida Counties' ruling on the collection of property taxes, Docket No. 10-72 before this Court, the New York State Court of Appeals also concluded that even though the former Cayuga reservation had been under the continual

jurisdiction of the state of New York from the Treaty of February 25, 1789 forward, it was somehow a federal "reservation."

The State Court of Appeals concluded that the cigarettes were sold within a "qualified reservation" as defined by Tax Law § 471 by applying federal law to define the land status upon which the two convenience stores selling the cigarettes were located. The Counties attempted to argue against the interpretations of federal Indian common law by alleging the Cayuga reservation was disestablished or diminished as a matter of federal law. While the *Sherrill* ruling calls into question the equity of reestablishing long extinguished rights of tribal sovereignty, it did not expressly reach the issue of whether the former state reservations of land are or are not presently federal "Indian country" or are still "reservations."

The State of New York has a history in statute and case law of allowing the Indian tribes recognized by the State to continue to live by their own laws. It was a policy established with the Treaty of Fort Schuyler in 1788 and codified into state law before the Constitution of the United States went into effect. New York has treated the Indians as state citizens and as separate governments. This state policy allowed these tribal governments to continue to apply their own customs to their own unique societies for over 200 years. This respect for the Iroquois Confederacy is noticeable even today in the State Court of Appeals ruling that is the subject of this case.

This continual respect for the Indian cultures has also made New York particularly vulnerable to the

swings in federal Indian policy. During periods of federal benign neglect of the Indians, New York has been left alone to interact with the New York tribes. It has been only when the federal government has decided to advocate for specific tribal interests that the federal government asserts that the Treaty of Canandaigua, 7 Stat. 44, created a continual federal authority over not only the Indian people and tribes but also federal rights in the state reservation lands. There was considerable discussion within the Bureau of Indian Affairs (BIA) Indian Organization Division (IOD) from July 1934 through 1936 whether the New York tribes were even eligible to vote for the Indian Reorganization Act (IRA) of 1934. A last minute decision from Commissioner John Collier allowed all of the New York tribes to vote on the IRA. All of the New York Indian tribes rejected the IRA because they did not want their traditional governments that had been respected by the State of New York to be replaced by the new tribal constitutions written by the BIA IOD.

I. THE INDIAN LAND CONFUSION IN NEW YORK

a. *The State Court of Appeals Decision*

In this case, the New York State Court of Appeals applied *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976) as allowing the state to tax cigarette sales transactions on former Indian reservations. Appendix of Petition for Certiorari (App.) 2a-3a. *Moe* concerns lands diminished from the federal Flathead reservation in Montana. *Moe* should have no application to a state reservation where New York had and has complete civil jurisdiction to tax sales transactions on

these lands that are under exclusive state jurisdiction. The New York State Court of Appeals defers to federal preemption without requiring the Indian tribe or United States to prove that federal preemption applies in the first place. This "deference" is the result of forty years of land claim litigation challenging New York's jurisdiction over the former state reservations.

As the New York State Court of Appeals opined:

> "Whether the convenience stores sit on reservation land presents a critical threshold consideration. Federal law currently precludes a state from collecting cigarette sales taxes on sales by Indians to members of their own tribe or nation only if those sales occur on a reservation or other Indian lands (*see e.g. Moe, supra*, 425 U.S. 463). If the convenience stores are not on parcels entitled to recognition as reservation land, no federal exemption applies to any of the cigarette sales associated with that location, regardless of the status of the customers who purchase the cigarettes. And if all of the transactions are taxable, the lack of a specific calculation or collection methodology that distinguishes between sales to members of the tribe and sales to other consumers is irrelevant and cannot be asserted as a basis to avoid compliance with the general cigarette sales tax statutes that govern the behavior of every other New York cigarette retailer."

(App. 23a-24a)

The Cayuga Indian reservation in New York was created by the State of New York with the Treaty of February 25, 1789. The term "reservation" was used very loosely through the Nineteenth and into the Twentieth Century. Congress was less than meticulous in modifying reservation status because it was assumed that all reservations were temporary set asides of land. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343-4 (1998). It was not until the Indian Reorganization Act of 1934 made reservations permanent that it was necessary to have a precise legal term to decide jurisdictional disputes.

> The Nation claims that the convenience store properties are covered by subsection (a) [2] because they are "[l]ands held by an Indian nation or tribe" since the Nation possesses title and they are located within the Nation's aboriginal reservation, which has never been extinguished or disestablished by the Federal government — the only entity with the power to divest property of its reservation status. Thus, the Nation argues that the term "reservation" in subsection (a) refers to property recognized as such by the federal government.

(App. 25a)

This last paragraph is the same argument made by the Oneida Indian Nation in the *City of Sherrill* case. Obviously, the state courts of New York had

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[2] Qualified Reservation. (a) Lands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state. Tax Law § 470(16). App. D 124a.

difficulty applying the facts and history from the *City of Sherrill* decision to the slightly different fact pattern required to enforce the state cigarette sales law, Tax Law § 471. The confusion expressed by the New York State Court of Appeals is the best evidence of the ongoing disputes over jurisdiction in New York.

> Although the Nation no longer possessed fee title to any of its aboriginal reservation lands after 1807, under federal law, the absence of a fee interest is not determinative of the issue of reservation status. It is well settled that only Congress has the power to disestablish or diminish a reservation (*see City of Sherrill*, 544 U.S. at 215 n 9). "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise" (*Solem v. Bartlett*, 465 US 463, 470, 104 S. Ct. 1161, 79 L. Ed. 2d 443 [1984]). Thus, the fact that the Nation entered into transactions transferring title to its aboriginal reservation property — including the convenience store parcels that were later reacquired — does not resolve the issue of whether the property in question retained its reservation status under federal law.

(App. 29a)

In various federal lawsuits, New York has claimed that the 1838 Treaty of Buffalo Creek disestablished some of the reservations that had been recognized in 1794, including the Cayuga

reservation. But to date that argument has not been credited by the federal courts. As the Second Circuit noted in *Cayuga Indian Nation of N.Y. v Pataki*, "the Treaty of Buffalo Creek neither mentions Cayuga land or Cayuga title in New York, nor refers to the 1795 or 1807 treaties between New York and the Cayuga" (413 F3d 266, 269 n 2 [2d Cir 2005], *cert denied* 547 U.S. 1126, 126 S. Ct. 2021, 164 L. Ed. 2d 780 [2006]). It appears that every federal court that has examined whether the Cayuga reservation was disestablished or diminished by Congress has answered that question in the negative (*see Cayuga Indian Nation of N.Y. v Village of Union Springs*, 317 F Supp 2d 128 [ND NY 2004] [1795 and 1807 transfers of land to NY violated Nonintercourse Act and were void ab initio and Congress did not disestablish or diminish Cayuga reservation in Treaty of Buffalo Creek], *action dismissed on other grounds* 390 F Supp 2d 203 [ND NY 2005]; *Cayuga Indian Nation of N.Y. v Cuomo*, 758 F Supp 107 [ND NY 1991] [lands reserved to Cayuga in 1794 Treaty of Canandaigua could only be divested by Congress] and 730 F. Supp. 2d 485 [ND NY 1990] [1795 and 1807 conveyances of land to New York were invalid under Nonintercourse Act and were not approved by Congress in the Treaty of Buffalo Creek], *action dismissed on other grounds sub nom Cayuga Indian Nation of N.Y. v Pataki, supra*, 413 F3d 266).

(App. 29a-30a)

After 40 years of litigation on the various land claims of the New York tribes there are so many lower

court decisions interpreting and misinterpreting facts it is impossible for any case in New York to straighten the confusion out. In this split decision of the Court of Appeals, the majority asks for help to finally resolve the land issues. App. at 30a. Only this Court can finally resolve the land status issues in New York and restore state sovereignty.

b. *The Omitted History of the Treaty of Buffalo Creek*

The *City of Sherrill* decision gives an accurate history of the treaties and federal laws discussed in the prior litigation affecting Indian land status in New York. Research done since the *City of Sherrill* ruling into the Nixon Indian Policy has revealed that material facts were intentionally left out of the tribal and federal applications of the Nonintercourse Act in the Oneida Test Case.[3] See http//:citizensalliance.org Nixon Memorandum. The Oneida Test Case led to the decisions in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*) and County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (Oneida II) that allowed the Oneida Indian Nation to sue to claim aboriginal rights they contended were violated by New York not complying with the Nonintercourse Act of 1790, 25 U.S.C. § 177. These cases were the basis of all of the land claim cases brought in New York by various Indian tribes including the Cayuga Tribe. These cases are also the basis of the Indian tribes claiming that the

[3] While it is true that the United States Department of Justice was not representing the interests of the Oneida Indian Nation in the Test Case, there are documents that prove the White House hired its own private attorneys to directly assist the Oneida attorneys in the case.

State of New York does not have primary civil jurisdiction over the former state reservations that finally culminated in the *City of Sherrill* decision.

The Nixon Memorandum specifically says that two major facts were omitted in claiming the Nonintercourse Act of 1790 applied to the sales of the state reservation lands in New York. See http//:citizensalliance.org Nixon Memorandum. First, the facts did not include the federal Removal Act of 1830, 4 Stat. 411, and the concomitant fact that the Treaty of Buffalo Creek, 7 Stat. 550, was a Removal Act treaty intended to disestablish whatever federal interest had been created in New York by the Treaty of Canandaigua, 7 Stat. 44. Nixon Memo at 20. The Removal Act was specifically drafted to meet the obligations of the federal government to the states to remove the Indians, dispose of the "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi so that state jurisdiction would no longer be impaired in the Eastern states.

The second omitted fact was that the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceded that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act. Nixon Memo at 23. This 1834 act was passed by Congress after Chief Justice Marshall tried to interfere with the Removal Act with his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832).

The term "Indian country" was first defined in the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, to refute the assertion of federal jurisdiction over the Cherokee lands created by Chief Justice Marshall in *Worcester v. Georgia*. *See* F. Cohen, Handbook of Federal Indian Law, 29-34. (1982 ed.). Congress and the Executive branch were very conscious of the fact that the federal Indian policy of treating Indians as capable of waging war against the United States was a constant potential interruption of state jurisdiction that could disrupt the everyday living in the states where Indian relations were no longer about Indians potentially making war. Chief Justice Marshall, a true federalist and vociferous opponent of President Andrew Jackson, made the already bad situation of the Eastern Indians worse by trying to combine a war power federal Indian policy begun by President Washington with a general trust responsibility for the Indians to be exercised at the same time. This true example of judicial activism turned federal Indian common law into a weapon against state sovereignty and the Indian people. All of this politics was involved in the making and ratification of the Treaty of Buffalo Creek.

The remaining Indians in New York were promised in the 1830's that they would be given their own land by the federal government if they would leave New York and make their homes in Kansas or Wisconsin. The situation in Kansas did not work out for the New York tribes, including the Cayuga. *See New York Indians v. United States*, 170 U.S. 1, 21 (1898). Many New York bands entered into the Treaty of Buffalo Creek, 7 Stat. 550, to receive their own land. As a matter of federal land law, the Removal Act operated by exchanging the lands where the federal government

was protecting the Indian title in a sovereign state for actual federal territorial lands in the West. Most of these people settled in Wisconsin on federal reservations purchased for them from the Menominee Tribe. Those that remained in New York were told that federal protection of Indian title and their federal ward status would end at the ratification of the Treaty of Buffalo Creek pursuant to the Removal Act and the Trade and Intercourse Act of 1834. Because many different bands of various tribes were involved in the Treaty of Buffalo Creek, amendments were made and Congress ratified the Treaty of Buffalo Creek in 1840. President Martin Van Buren then entered the Proclamation making the Treaty of Buffalo Creek complete. *See New York Indians* at 10, Fn.1, Finding 10.

The Removal Act was written to fulfill the United States relinquishment of "Indian title" to the original colonies that maintained the right of preemption and actual fee title over all of the lands within their borders. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). The Removal Act was the act of disestablishment or diminishment of the only interest the federal government claimed to hold: "Indian title." Once "Indian title" was relinquished in a treaty pursuant to the Removal Act, the land pursuant to the 1834 Indian Trade and Intercourse Act ceased to be federal Indian country. The Treaty of Buffalo Creek relinquished all Indian title held by the United States and the Indian tribes in New York based on the Treaty of Canandaigua of 1794. *New York Indians* at 170 U.S. 1, 21. It did not matter that not all of the Indians were removed. Those that remained in New York understood that all federal protection over the state

reservations of land ceased. The Indians also understood as Rev. Stat. § 2114 makes absolutely clear, once a treaty pursuant to the Removal Act was ratified, the United States retained exclusive jurisdiction over the Indians only "at their new residence." Once relinquished by the United States and Congress, "Indian title" was gone forever and cannot be restored. Only by omitting the facts surrounding the Treaty of Buffalo Creek could there be any claim that New York had wrongfully sold the state lands reserved for the Indian tribes.

As explained above, the "Indian title" was expressly relinquished by the United States and all New York Indians with the Treaty of Buffalo Creek. The 1834 Indian Trade and Intercourse Act defined Indian country as applying to land where the United States still held the "Indian title." Once the Indian title was relinquished there were no longer any federal restrictions on alienation over the state reservation. *See United States v. Boylan*, 265 F. 165, 167-8 (2nd Cir. 1920). According to the facts included in the *New York Indians* decision, the Cayuga had already ceded their entire reservation prior to the Treaty of Buffalo Creek. *New York Indians* at 8, Fn 1, Finding 7. The remaining Cayuga were living mostly on the Seneca reservation. The Cayuga were signatories to the Treaty of Buffalo Creek and many removed to Wisconsin. This was required to extinguish any and all claims of Indian title or restrictions against alienation as explained above.

Once Indian land is alienated by act of Congress, even if the Indian tribe reacquires them, the protections of the Nonintercourse Act no longer apply. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476

U.S. 498, 505-06 (1986). The New York State Court of Appeals was wrong to apply *Moe v. Salish and Kootenai Tribes* to the Cayuga reservation in New York. There is no remaining federal interest in New York to any of the remaining state reservations. From the ratification of the Treaty of Buffalo Creek in1840 forward there was no Cayuga Indian reservation as a matter of federal statute. The Cayuga reservation has not existed for 200 years under state law. Since the reservation does not exist, the fact that the Cayuga acquired parcels in the extinguished reservation does not make those lands a "qualified reservation" under Tax Law § 470(16). Only if federal Indian common law can be applied to overcome the prior statutory law, could a Cayuga Indian reservation be claimed to exist.

II. FEDERAL INDIAN COMMON LAW THREATENS STATE SOVEREIGNTY

a. *The Ruling in Oneida I Challenges the Relinquishment of Indian Title From the Treaty of Buffalo Creek*

This Court concluded in *Oneida* I that the federal right of occupancy or "Indian title" was still vested in the United States for all Indian land. *Oneida* I at 667-70. It even concluded that this doctrine of a federal right of occupancy was absolute and applied to the original colonies as interpreted in *Fletcher v. Peck*, 10 U.S. 87 (1810) and *Worcester v. Georgia*, 31 U.S. 515 (1832). This led to the conclusion that the Oneida Indian Nation had a present right of occupancy over the former state reservation and could sue the State of New York to reassert its sovereign rights. After 30 years of litigation in various federal court actions, this

Court decided in *City of Sherrill* that the doctrine of laches applied to the claims of the OIN to prevent the OIN from rekindling embers of sovereignty that had long ago grown cold but did not expressly overrule any of the prior holdings against the State of New York and Counties. This means that there is still an absolute federal right of occupancy or "Indian title" in the Oneida and other New York tribes as a matter of equity according to *Oneida* I.

Either Indian title was relinquished and extinguished with the Removal Act of 1830 as executed by the Treaty of Buffalo Creek and the Trade and Intercourse Act of 1834 as explained above or Indian title still is held by the United States under *Oneida* I. It cannot be both ways. The Nixon administration was actively involved with attorneys representing tribal interests from 1969-1974. William Veeder was working for the White House and communicating directly with the American Indian Movement (AIM). Other attorneys like Reid Peyton Chambers and Harry Sachse were also representing the White House Indian Policy even though they were not necessarily named on any pleadings. According to archive documents, these lawyers were paid through Congressional appropriations to the Executive Branch. It is difficult to believe that the White House was not directly involved in crafting the presentation of the Oneida Test case to open land claim proceedings in New York in light of the Nixon Memorandum. This would also explain why the United States even after the *City of Sherrill* decision has not changed course in New York and is still trying to restore tribal sovereignty.

The mischief created from this ruling in *Oneida* I is twofold. First, it gave the United States a direct power to overcome the history of the Removal Act to reverse land decisions made 150 years earlier by the President and Congress as explained in the first section of this brief. Second, it allowed the Oneida Indian tribe to have standing as a separate sovereign entity independent of the United States asserting its interests in state and federal court. With the ruling in *Oneida* I this Court gave these IRA created territorial governments their own authority to expand federal Indian common law without having to address the consequences to the Constitutional structure. This single decision made the United States unaccountable for the actions of its wards in hundreds of subsequent court cases challenging local and state governments. This ruling has affected the separation of powers, including federalism.

b. *Allowing the Indians to Continue to be Federal Wards With IRA Created Territorial Governments*

Besides the land status confusion that threatens the sovereignty of the state of New York, the other side of this confusion is the fact that as long as the United States can separate the Indians by race and promote only their interests against the interests of everyone else, the Tribes will disrupt local state governance. The last pages of the Nixon Memorandum present a very threatening scenario to create a permanent separate racial sovereignty that threatens the structure of our Constitution. The Nixon Memorandum is titled "Native Americans: At What level Sovereignty?" The Memorandum was written by

White House counsel after President Nixon was forced to resign because of the Watergate scandal. Because the Nixon White House had very limited central files for various issues, when President Nixon resigned each White House project prepared a memorandum for President Ford. The original Nixon Memorandum is located in the Ford Presidential Library in the files of Leonard Garment, former Chief White House Counsel.

The Nixon Indian Policy used both the existing federal Indian common law that the Indians are wards and the IRA to make an unlimited federal Indian policy that was solely managed by the President. According to the internal documents from the Nixon administration neither the Department of the Interior or the Department of Justice had much involvement with Indian law during the Nixon Presidency. Because the IRA as passed by Congress did adopt Commissioner Collier's concept of creating separate tribal municipal governments, the federal Indian common law decisions of *Elk v. Wilkins*, 112 U.S. 94, 99 (1884) and *United States v. Kagama*, 118 U.S. 375 (1886) incorporating the rationale that Indian tribes were located on entirely separate unsettled territory of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857) are applicable to the policy of the IRA.

Allowing a war powers Indian policy to combine with a general trust responsibility as Chief Justice Marshall designed in the Marshall trilogy to oppose President Andrew Jackson and the Removal policy in the 1830's was a potential threat to state sovereignty that no President abused until President Richard Nixon. But, the Marshall judicial activism was used in the *Dred Scott* decision and at the end of the Civil War

in creating the Indian policy of 1871. *See Scott* at 404 and *Kagama* at 382-5. The war power policy of 1871 deliberately altered the trust relationship to stop treaty making and placed Indians and Indian tribes directly under military authority. Rev. Stat. § 2079 and § 2152. The Indian Policy of 1871 was applied to limit state sovereignty in *United States v. Kagama. Id.* at 382-5. The IRA was originally designed by John Collier to use all of these war powers to carve out completely separate sovereign rights for the Indians. But Congress rejected most of Collier's plan, only passing the very limited IRA.

As explained in previous briefs, the Constitution contains authority for the federal government to establish local municipal governments: the Property Clause, Art. IV, Sec. 3, Cl. 2. The Property Clause expressly sets the authority of the Congress to acquire territorial lands and dispose of the territorial lands of the United States. The Property Clause also allows territorial land to be reserved for federal uses and to establish local governments to prepare the people in those areas for citizenship. *See United States v. Gratiot, et al*, 39 U.S. 526 (1840). As long as the IRA policy was treated as "temporary" to prepare the Indians for full citizenship the policy was constitutional. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 476-81 (1915).

With President Nixon's Message to Congress of July 8, 1970, the era of the Nixon Indian Policy began. It was based on making the policy of the IRA permanent. Because the Secretary claimed he could define which Indian tribes were "recognized" as a continuing power, the power claimed by President Nixon was unlimited by any constitutional restraints.

As the first heading of the Nixon Message says: Self-Determination Without Termination. The policy goes on to articulate how any federal program can be delegated to tribal authority. This is unlimited Executive authority to define the Indian trust. No longer is there any deference to Congress required as this Court assumed in *United States v. Kagama*, 118 U.S. 375, 384-5 (1886) to limit its federal common law interpretation of the Indian trust relationship. President Nixon took his newly declared "Indian trust" power without any act of Congress and proceeded to the federal courts to have his assumed power legitimized as federal Indian common law. Starting with *Mescalero Apache v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona*, 411 U.S. 164 (1973), this Court again allowed off reservation "trust responsibility" as it had previously acknowledged in *United States v. Minnesota*, 305 U.S. 382 (1938), *United States v. McGowan*, 302 U.S. 535 (1938), and *United States as Guardian of the Walapai v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). This Court allowed the Nixon Administration to reinterpret the IRA into a permanent policy to intentionally threaten the constitutional structure and federalism. See *Morton v. Mancari*, 417 U.S. 535, 545 (1974). This virtually unlimited executive power is what the Supreme Court released on the people and State of New York in holding that as a matter of federal Indian common law the Oneida Indian Nation could sue to claim its purported federal rights to its former Indian reservation in *Oneida* I.

III. PRECEDENTS MUST BE OVERRULED TO LIMIT THE NIXON INDIAN POLICY

This Court began placing the Indian trust power back within the structure of the Constitution of the United States with the *City of Sherrill* ruling by specifically rebalancing the equities to limit the jurisdiction of the federal courts to expand the "Indian trust" through federal common law rulings. *Sherrill* at 218-20. This Court in *Sherrill* expressly rejected the "unification theory" of the Nixon administration that allowed a merger of Indian title and fee ownership to restore tribal sovereignty to land that had been under state jurisdiction. *Id.* at 213-4. But *Sherrill* has not resolved the underlying problem of the loss of state jurisdiction. This case is just the beginning of New York State attempting to enforce its tax on cigarettes sold to non-Indians all over the state. This is not only a revenue issue. Cigarette sales are also a traditional health and safety issue under the state's police powers. Many New York tribes have filed suit against the state and its statutes that try to correctly interpret the federal law that has been enforced against New York for forty years of land claim litigation.

The wrongful conclusions that the Nonintercourse Act of 1790 was violated by New York must be corrected to allow New York to enforce taxes against cigarette sales to non-Indians. There is no way to correct the confusion and loss of state sovereignty if this Court is not willing to overrule the prior decisions that released the insidious Nixon Indian policy.

CONCLUSION

The Court should reverse the decision of the New York State Court of Appeals.

Respectfully submitted,

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